DOCKET

No. 08-1224
Title: United States, Petitioner
v.
Graydon Earl Comstock, Jr., et al.
Docketed: April 3, 2009
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (07-7671, 07-7672, 07-7673, 07-7674, 07-7675)
Decision Date: January 8, 2009
Rehearing Denied: March 10, 2009
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Apr 3 2009	Application (08A863) for stay of the mandate of the United States Court of Appeals for the Fourth Circuit pending the disposition of the petition for a writ of certiorari, submitted to The Chief Justice.
Apr 3 2009	Petition for a writ of certiorari filed. (Response due May 4, 2009)
Apr 3 2009	Application (08A863) granted by The Chief Justice. The mandate of the United States Court of Appeals for the Fourth Circuit, case No. 07-7671, is stayed pending the disposition of the petition for a writ of certiorari. See Walters v. National Assn. of Radiation Survivors, 468 U.S. 1323 (1984) (Rehnquist, J., in chambers). Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.
Apr 20 2009	Order extending time to file response to petition to and including June 3, 2009.
May 20 2009	Brief of respondents Graydon Earl Comstock, Jr., et al. in opposition filed.
May 20 2009	Motion for leave to proceed in forma pauperis filed by respondents Graydon Earl Comstock, Jr., et al.
Jun 2 2009	DISTRIBUTED for Conference of June 18, 2009.
Jun 2 2009	Reply of petitioner United States filed. (Distributed)
Jun 22 2009	Motion for leave to proceed in forma pauperis filed by respondents GRANTED.
Jun 22 2009	Petition GRANTED.
Aug 4 2009	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 28, 2009.
Aug 4 2009	The time within which to file respondents' brief on the merits is extended to and including October 28, 2009.
Aug 28 2009	Joint appendix filed.
Aug 28 2009	Brief of petitioner United States filed.
Sep 4 2009	Brief amici curiae of Kansas, et al. filed.
Oct 28 2009	Brief of respondents Graydon Earl Comstock, Jr., et al. filed.
Nov 2 2009	SET FOR ARGUMENT ON Tuesday, January 12, 2010.
Nov 2 2009	CIRCULATED.
Nov 4 2009	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed. (Distributed)
Nov 4 2009	Brief amici curiae of Cato Institute, and Professor Randy E. Barnett filed. (Distributed)
Nov 4 2009	Motion of Kansas, et al. for leave to participate in oral argument as amici curiae and for

	divided argument filed.
Nov 27 2009	Reply of petitioner United States filed. (Distributed)
Nov 30 2009	Motion of Kansas, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.
Dec 8 2009	Record received from U.S.D.C. for Eastern District of North Carolina. (1 envelope)
Dec 10 2009	Record received from U.S.C.A. Fourth Circuit. (1 envelope)
Jan 8 2010	Letter from counsel for the petitioner filed. (Distributed)
Jan 12 2010	Argued. For petitioner: Elena Kagan, Solicitor General, Department of Justice, Washington, D.C. For respondents: G. Alan DuBois, Assistant Federal Public Defender, Raleigh, N.C.

PETITION
FOR
WRIT OF
CERTIORARI

Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GRAYDON EARL COMSTOCK, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress had the constitutional authority to enact 18 U.S.C. 4248, which authorizes court-ordered civil commitment by the federal government of (1) "sexually dangerous" persons who are already in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences, and (2) "sexually dangerous" persons who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following four individuals were parties in the court of appeals proceeding, which consolidated five cases from the district court: Shane Catron; Thomas Matherly; Markis Revland; and Marvin Vigil.

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ON PETITION FOR A WRIT OF CERTIORARI
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FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 551 F.3d 274. The opinion of the district court (App., *infra*, 22a-95a) is reported at 507 F. Supp. 2d 522.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 2009. A petition for rehearing was denied on March 10, 2009 (App., *infra*, 96a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Necessary and Proper Clause of the United States Constitution, Article I, Section 8, Clause 18, provides: "The Congress shall have Power * * * [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Relevant statutory provisions are reprinted in the appendix to this petition. App., *infra*, 97a-114a.

STATEMENT

This case involves a challenge to Congress's constitutional power to provide for court-ordered civil commitment of mentally ill, "sexually dangerous" persons in federal custody who have been found incompetent to stand trial on federal charges or who are nearing the expiration of their term of imprisonment after a criminal conviction. Congress authorized such commitment proceedings in 2006 by enacting 18 U.S.C. 4248, which was made part of a longstanding statutory framework of civil-commitment procedures applicable to persons in federal custody.

1. a. In the nineteenth century, federal statutes provided that federal prisoners who became insane while serving their sentences, or persons charged with offenses against the United States and in the actual custody of its officers, could be transferred to a federal mental hospital. See Act of June 23, 1874, ch. 465, § 1, 18 Stat. 251; Act of Aug. 7, 1882, ch. 433, 22 Stat. 330. Those statutes were seen as vindicating "the duty of the United States to take care of convicts who may become

insane while in her custody." *Government Hosp. for the Insane*, 17 Op. Att'y Gen. 211, 212-213 (1881) (emphasis omitted). In 1916, however, the Attorney General concluded that those statutes did not authorize the continued detention of a prisoner after his sentence had expired, because they did not provide for appropriate procedures (*i.e.*, "notice and proper hearing") to determine whether insanity warranted longer detention. *Commitment to Gov't Hosp. for the Insane*, 30 Op. Att'y Gen. 569, 571; see also *Case of Insane Convict After Expiration of Term of Imprisonment*, 35 Op. Att'y Gen. 366, 369 (1927).

As a result, the Bureau of Prisons (BOP) was sometimes presented with the "serious problem" of "what to do with insane criminals upon the expiration of their terms of confinement, where it would be dangerous to turn them loose upon society and where no state will assume responsibility for their custody." United States Judicial Conference, *Report of Committee to Study Treatment Accorded by Federal Courts to Insane Persons Charged with Crime* 11 (1945) (*Judicial Conference Committee Report*).[1] In the late 1940s, "after long study by a conspicuously able committee, followed by consultation with federal district and circuit judges," the Judicial Conference proposed draft legislation to address the situation that arises when the federal government "'has lawful custody of a person whom it is not safe to let at large.'" *Greenwood* v. *United States*, 350 U.S. 366, 373, 374 (1956) (quoting *Judicial Conference Committee Report* 7).

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[1] The Judicial Conference Committee Report was reprinted in its entirety as an addendum to the government's court of appeals brief.

Congress responded, and since the late 1940s federal statutes have provided a comprehensive framework for the court-ordered civil commitment of various categories of persons in federal custody. See Act of Sept. 7, 1949, ch. 535, 63 Stat. 686 (18 U.S.C. 4244-4248 (1952)); Act of June 25, 1948, ch. 645, 62 Stat. 855 (18 U.S.C. 4241-4243 (1952)). Those categories include persons found to be mentally incompetent to stand trial (18 U.S.C. 4241); persons found not guilty by reason of insanity (18 U.S.C. 4243); and persons determined to be suffering from a mental disease or defect either before sentencing (18 U.S.C. 4244) or while imprisoned (18 U.S.C. 4245).

Those provisions also explicitly authorize civil-commitment proceedings against prisoners whose terms of imprisonment are about to end.[2] In its present form, 18 U.S.C. 4246 provides procedures for hospitalizing, *inter alia*, a person "in the custody of the Bureau of Prisons" whose term of incarceration "is about to expire" and who is found to "suffer[] from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another." 18 U.S.C. 4246(a). That provision was originally enacted to address problems posed by the "appreciable number" of federal prisoners who, at the end of their terms, were not accepted by state institutions for "lack of legal residence in any State but who ought not, however, to be at large because they constitute a menace to public safety." H.R. Rep. No. 1319, 81st Cong., 1st Sess. 2 (1949).[3]

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[2] The legislative history reinforces Congress's manifest intention in 1949 to provide statutory authority for "the continued restraint of [mentally incompetent persons] after their sentences expire." S. Rep. No. 209, 81st Cong., 1st Sess. 2 (1949) (letter from Peyton Ford, Assistant to the Attorney General); see also H.R. Rep. No. 1319, 81st Cong., 1st Sess. 2 (1949) (referring to "the need for specific statutory authority to deal with those cases (*a*) where preexisting mental incompetency manifests itself only after commitment under sentence and (*b*) where such mental condition exists upon expiration of sentence, with no constituted authorities able or willing to assume custody, and outright release would be incompatible with public safety").

The procedural safeguards for commitment hearings under that statutory framework are set out in 18 U.S.C. 4247. They include provisions for a court-ordered psychiatric or psychological examination, representation by counsel (including appointed counsel), and the opportunity to testify, present evidence, subpoena witnesses, and confront and cross-examine witnesses who appear at the hearing. 18 U.S.C. 4247(b)-(d).

b. The longstanding civil-commitment regime for persons in federal custody was amended and supplemented by Title III of the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act), Pub. L. No. 109-248, 120 Stat. 617. That Act added 18 U.S.C. 4248, which expressly authorizes the federal government to seek the court-ordered civil commitment of certain "sexually dangerous person[s]" already in its custody. § 302(4), 120 Stat. 620. In particular, Section 4248 applies to persons who are in the custody of the BOP, who have been committed to the custody of the Attorney General because they have been determined to be mentally incompetent to stand trial or to undergo post-release proceedings, or who have had all criminal charges against them dismissed solely for reasons relating to their mental condition.[4] 18 U.S.C. 4248(a). A commitment proceeding under Section 4248 is initiated when the Attorney General, the Director of the BOP, or one of their designees or delegees, certifies to the federal district court for the district in which the person is confined that he "is a sexually dangerous person." *Ibid.*

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[3] Section 4246 also applies to persons who have been committed to the Attorney General's custody pursuant to Section 4241(d) (*e.g.*, those who have been charged with federal offenses but found incompetent to stand trial), and persons against whom criminal charges have been dismissed solely for reasons related to their mental condition. 18 U.S.C. 4246(a).

The statute defines a "sexually dangerous person" as someone "who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others." 18 U.S.C. 4247(a)(5). A person is defined by the statute to be "sexually dangerous to others" if he "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. 4247(a)(6).[5]

Once the government has initiated a commitment proceeding in federal district court by filing a certificate of sexual dangerousness, the statute "stay[s] the release" of the respondent from federal custody "pending completion of procedures contained in [Section 4248]." 18 U.S.C. 4248(a). Those procedures include an opportunity for the district court to order a psychiatric or psychological examination (to be followed by the filing of a report with the court), and a mandatory district court "hearing to determine whether the person is a sexually dangerous person." 18 U.S.C. 4248(a), (b) and (c). At the hearing, the respondent "shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him." 18 U.S.C. 4247(d); see 18 U.S.C. 4248(c). The respondent must be given "an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing." 18 U.S.C. 4247(d). At the hearing, the government has the burden of proving "by clear and convincing evidence that the person is a sexually dangerous person."[6] 18 U.S.C. 4248(d).

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[4] If the government concludes that a person in its custody is sexually dangerous but all charges against him have been dismissed "for reasons *not related* to [his] mental condition," continued detention by the federal government is not authorized under Section 4248. 18 U.S.C. 4248(g) (emphasis added). Instead, the person shall be promptly released to a state official "for the purpose of institution of State proceedings for civil commitment," or—if the Attorney General receives notice from the States in which the person is domiciled or was tried that they will not assume responsibility for him—the person shall be released outright. *Ibid.*

[5] Although they were not in effect when this case began, the BOP has adopted regulations that further define "sexually violent conduct" and "child molestation," and provide a nonexclusive list of evidence that may be considered in "determining whether a person will have 'serious difficulty in refraining from sexually violent conduct or child molestation if released.'" 28 C.F.R. 549.92, 549.93, 549.95.

If the district court finds, after the hearing, that the government has carried its burden of proving sexual dangerousness, it must commit the respondent to the custody of the Attorney General. 18 U.S.C. 4248(d). At that point, "[t]he Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment." *Ibid.* To that end, "[t]he Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility."[7] *Ibid.*

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[6] The legislative history reflects Congress's intention that the standards for commitment be "substantively similar to those approved" in *Kansas* v. *Hendricks*, 521 U.S. 346 (1997), and *Kansas* v. *Crane*, 534 U.S. 407 (2002). See H.R. Rep. No. 218, 109th Cong., 1st Sess. Pt. 1, at 29 (2005).

> If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall place the person for treatment in a suitable facility, until—
>
> (1) such a State will assume such responsibility; or
>
> (2) the person's condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment;
>
> whichever is earlier.

18 U.S.C. 4248(d).[8]

During the time a person is committed pursuant to Section 4248, the director of the facility in which he is committed must "prepare annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued commitment." 18 U.S.C. 4247(e)(1)(B). Those reports are to be "submitted to the court" that ordered the commitment. *Ibid.* The director must also inform the committed person of "any rehabilitation programs that are available" in the facility. 18 U.S.C. 4247(e)(2). If the director determines that the committed person "is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment, [the director] shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment." 18 U.S.C. 4248(e). The court must then either order the person's discharge or hold a hearing to determine whether he should be released and, if so, under what conditions. *Ibid.* Even if the director has not determined that a committed person is no longer sexually dangerous, that person's "counsel" or "legal guardian may, at any time during [that] person's commitment" (except during the first 180 days after a court has determined that commitment should continue) "file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged" from the federal facility. 18 U.S.C. 4247(h). The statute also states that it does not preclude a committed person from "establishing by writ of habeas corpus the illegality of his detention." 18 U.S.C. 4247(g).

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[7] The Adam Walsh Act also authorizes the Attorney General to award federal grants to States "for the purpose of establishing, enhancing, or operating effective civil commitment programs for sexually dangerous persons." § 301(a), 120 Stat. 617-618 (42 U.S.C. 16971(a)).

[8] A "suitable facility" is defined as one that "is suitable to provide care or treatment given the * * * characteristics of the defendant." 18 U.S.C. 4247(a)(2).

2. a. This case comprises five civil-commitment proceedings that were initiated by the United States in the District Court for the Eastern District of North Carolina.[9] The United States instituted proceedings against each of the five respondents pursuant to Section 4248 in November and December 2006. At that time, respondents Comstock, Revland, Matherly, and Vigil were each about to complete a prison term in BOP custody, which

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[9] The cases were not formally consolidated in the district court, but the court issued one opinion addressing what it called "substantially identical" motions to dismiss in all five cases. App., *infra*, 25a n.3. The court of appeals consolidated the cases on the same day that the government's appeals were docketed. See 07-7671 Docket entry No. 11 (4th Cir. Nov. 29, 2007).

was to be followed by a three-year period of supervised release. App., *infra*, 24a-25a & n.2. Respondent Vigil had been sentenced to a 96-month term of imprisonment after pleading guilty to one count of sexual abuse of a minor; respondents Comstock, Revland, and Matherly had been sentenced, respectively, to 37-month, 60-month, and 41-month terms of imprisonment after pleading guilty to one count each of possession of child pornography. *Ibid.*

The fifth respondent, Catron, was indicted in 2004 on four counts of aggravated sexual abuse of a minor under the age of 12 and one count of abusive sexual conduct, but he was found incompetent to stand trial. He was committed pursuant to 18 U.S.C. 4241(d) for treatment and evaluation to determine whether he was likely to attain capacity to proceed to trial in the foreseeable future. After concluding that respondent Catron could not be restored to competency and that he would be dangerous to others if released, the government initiated civil-commitment proceedings against him under 18 U.S.C. 4246. The Adam Walsh Act was then enacted, and the government concluded, in light of Catron's history and diagnoses, that it would be more appropriate for him to be committed under Section 4248. Accordingly, the government withdrew the Section 4246 certificate and filed a certificate pursuant to Section 4248. See 5:06-HC-2202-BR Docket entry No. 1 (E.D.N.C. Nov. 13, 2006).

b. Each of the five respondents moved to dismiss his civil-commitment proceeding on various constitutional grounds. On September 7, 2007, the district court granted their motions to dismiss in a single opinion. App., *infra*, 22a-95a.

The district court rejected respondents' arguments that were predicated on the proposition that Section

4248 commitment proceedings are criminal rather than civil, App., *infra*, 29a-32a, but it held Section 4248 unconstitutional on its face on two grounds. First, it held that Section 4248 is beyond Congress's powers under the Commerce Clause and the Necessary and Proper Clause. The court reasoned that to sustain the statute under those Clauses "would allow Congress to take steps to 'prevent' all kinds of conduct that it has no ability to criminalize in the first place," because a person's tendency to engage in sexually dangerous acts does not show a "likelihood" that he "will commit a *federal* crime." *Id.* at 51a, 53a. The court sought to distinguish Section 4248 from 18 U.S.C. 4246—which also authorizes commitment of mentally ill persons whose release would create a substantial risk of bodily injury or property damage—in part on the ground that Section 4246 requires the Attorney General to certify that no suitable state arrangements are available *before* initiating federal commitment proceedings, while Section 4248 requires an inquiry into suitable state arrangements only after commitment has occurred. App., *infra*, 63a-72a. The court concluded that Section 4248's provision on that score failed to incorporate sufficient "deference to the states' police and *parens patriae* powers." *Id.* at 68a.

Second, the district court held that Section 4248 violates the requirements of procedural due process, because it requires the government to prove the commission of prior acts or attempts to engage in sexually violent conduct or child molestation by "clear and convincing evidence," rather than beyond a reasonable doubt. *Id.* at 76a-93a.

The district court stayed implementation of its order pending the government's appeal. App., *infra*, 94a; 5:06-

HC-2195-BR Docket entry No. 40 (E.D.N.C. Nov. 26, 2007).

3. The court of appeals affirmed. App., *infra*, 1a-21a. It held that Section 4248 is unconstitutional on its face because it exceeds Congress's enumerated powers "to confine a person solely because of asserted 'sexual dangerousness' when the Government need not allege (let alone prove) that this 'dangerousness' violates any federal law." *Id.* at 3a-4a. The court did not reach respondents' other constitutional challenges to the statute. *Id.* at 4a n.1.

a. The court of appeals rejected the government's contention that Congress was constitutionally authorized to enact Section 4248 incident to the government's undisputed authority to operate the federal criminal-justice and penal systems and to assume custodial responsibilities for its prisoners. App., *infra*, 13a. The court acknowledged that "Congress may establish and run a federal penal system," and that "consistent with its role in maintaining a penal system, the federal government possesses broad powers over persons *during* their prison sentences." *Id.* at 13a-14a. But the court concluded that those "powers are far removed from the indefinite civil commitment of persons *after* the expiration of their prison terms, based solely on possible future actions that the federal government lacks power to regulate directly." *Id.* at 14a. The court further declared that "[t]he fact of previously lawful federal custody simply does not, in itself, provide Congress with any authority to regulate future conduct that occurs outside of the prison walls." *Ibid.* The court quoted the district court's conclusion that custody is not a basis for commitment "*after* a person has completed a sentence for a federal crime, i.e., when the power to prosecute federal offenses is exhausted," and "where there has been no showing that the person is likely to engage in conduct that Congress, as opposed to the states, actually has the authority to criminalize." *Id.* at 14a-15a (quoting *id.* at 76a). The court of appeals acknowledged that respondents "Comstock, Matherly, Vigil, and Revland remain subject to supervised release," but it did not consider that remaining sentence under federal jurisdiction to be a sufficient basis for Congress to provide for their civil commitment. The court reasoned that the United States "has no unexhausted power to prosecute a *former* federal prisoner simply because he *could* violate a term of his supervised release." *Id.* at 19a n.11.

The court of appeals recognized that the circumstances of respondent Catron's case "differ greatly" from those of the other respondents, since the finding that he was incompetent to stand trial meant that the federal government's prosecutorial powers were unexhausted. App., *infra*, 18a-19a n.10. While the court expressly noted that Catron's commitment under Section 4246 "would lie within [the federal government's] constitutional authority," it did not explain why the same unexhausted prosecutorial power could not justify detention under Section 4248. *Ibid.* Instead, the court declined "to bifurcate [his] unique challenge to § 4248" because, it said, "no party" had asked "for such 'finely drawn' relief." *Ibid.*

b. The court of appeals also rejected the government's contention that the civil-commitment procedures further a legitimate government interest in preventing future federal offenses related to sexual assault, molestation, and pornography. App., *infra*, 15a-18a. The court recognized that the federal government has the power to take reasonable steps to prevent federal crimes. But it concluded that Section 4248 "sweeps far too broadly to be a valid effort to prevent *federal* criminal activity," because it "targets 'sexual dangerousness' generally" and "many commitments under § 4248 would prevent conduct prohibited *only* by *state law*." *Id.* at 15a-16a. The court observed that the total number of federal prisoners is small compared to state prisoners, and that the number of prisoners in state custody for rape or other sex assaults is much larger than the number in federal prisons for sexual crimes. *Id.* at 15a n.8.

REASONS FOR GRANTING THE PETITION

The court of appeals has held unconstitutional an important Act of Congress that was adopted to protect the public against the release of federal inmates who suffer from a serious mental illness, abnormality, or disorder and are sexually dangerous to others. The court erroneously rejected Congress's judgment that the initiation of civil-commitment proceedings against a person already in federal custody is an appropriate—and therefore necessary and proper—component of Congress's unquestioned power to enact criminal laws prohibiting conduct within the scope of its Article I powers and to punish persons convicted of violating those laws by committing them to federal custody. Although the decision below is the first court of appeals decision specifically to address the question of the constitutionality of 18 U.S.C. 4248, its reasoning is difficult to reconcile with this Court's decision in *Greenwood* v. *United States*, 350 U.S. 366 (1956), and with decisions of other courts of appeals. Review of the court of appeals' constitutional holding therefore is warranted.

1. On numerous occasions, when a court of appeals has held an Act of Congress unconstitutional, this Court

has granted a writ of certiorari, even in the absence of a circuit conflict. See, *e.g.*, *Gonzales* v. *Carhart*, 550 U.S. 124 (2007); *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004); *Pierce County* v. *Guillen*, 537 U.S. 129 (2003); *United States* v. *Morrison*, 529 U.S. 598 (2000); *NEA* v. *Finley*, 524 U.S. 569 (1998); *Babbitt* v. *Youpee*, 519 U.S. 234 (1997); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995); *United States* v. *National Treasury Employees Union*, 513 U.S. 454 (1995); *United States* v. *Edge Broad. Co.*, 509 U.S. 418 (1993); *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307 (1993); see also Eugene Gressman et al., *Supreme Court Practice* 264 (9th ed. 2007) ("Where the decision below holds a federal statute unconstitutional * * * , certiorari is usually granted because of the obvious importance of the case."). That practice is consistent with this Court's recognition that "declar[ing] an Act of Congress unconstitutional * * * is the gravest and most delicate" of judicial tasks. *Blodgett* v. *Holden*, 275 U.S. 142, 147-148 (1927) (opinion of Holmes, J.). It is also consistent with this Court's own rules, which provide that certiorari is appropriate when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

Although the decision in this case is the first from a court of appeals to address the constitutionality of Section 4248 (see App., *infra*, 3a), the substantiality and recurring nature of the question is shown by a division among district court opinions. Four district court decisions have upheld the statute as a valid exercise of Congress's Article I powers. See *United States* v. *Abregana*, 574 F. Supp. 2d 1123, 1129-1134 (D. Haw. 2008); *United States* v. *Dowell*, No. CIV-06-1216-D, 2007 WL 5361304, at *2-*7 (W.D. Okla. Dec. 5, 2007); *United*

States v. *Shields*, 522 F. Supp. 2d 317, 325-326 (D. Mass. 2007), appeal pending, No. 09-1330 (notice of appeal filed Mar. 11, 2009); *United States* v. *Carta*, 503 F. Supp. 2d 405, 407-408 (D. Mass. 2007). Two district court decisions—aside from the one in this case—have found the statute to be beyond Congress's powers. The decision of the District of Minnesota in *United States* v. *Tom*, 558 F. Supp. 2d 931 (2008), is on appeal before the Eighth Circuit, No. 08-2345 (argued Mar. 12, 2009). And the recent decision of the District of Massachusetts in *United States* v. *Volungus*, No. 07-12060, 2009 WL 489838 (Feb. 27, 2009), is stayed pending possible appeal (Docket entry No. 34 (Feb. 27, 2009)).

Review of the Fourth Circuit's decision in this case is also especially appropriate in light of the geographic distribution of the proceedings that the government has initiated under Section 4248. The most suitable BOP facility for evaluating and treating sex offenders is located at the Federal Correctional Complex in Butner, North Carolina. As a result, most of the persons who have been certified as sexually dangerous under Section 4248 are housed there, and the great majority of all Section 4248 certificates (both before and after the district court's decision in this case) have been filed in the Eastern District of North Carolina.[10] Thus, in the absence of further review by this Court, the Fourth Circuit's decision will largely nullify Section 4248 for the foreseeable future.

2. In holding Section 4248 unconstitutional on its face, the court of appeals peremptorily concluded that

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[10] The BOP has certified 95 persons under Section 4248, and proceedings remain pending against 88 of them. Of those 88 proceedings, 77 (including those of the five respondents in this case) were certified in the Eastern District of North Carolina.

Congress is without any power to provide for the court-ordered civil commitment of dangerous, mentally ill persons beyond the duration of their prison sentences, regardless of the threat they pose to public safety. Deeming the government's special responsibilities as custodian to be irrelevant, the court analyzed the civil-commitment authority under Section 4248 as if it were being asserted without reference to respondents' status as federal inmates (four of whom were also, as part of their original criminal sentences, subject to terms of supervised release following their incarceration). Proceeding on the erroneous premise that respondents are indistinguishable from members of the public at large, the court concluded that this case is not meaningfully different from *United States* v. *Morrison*, 529 U.S. 598 (2000), because the federal government has no general authority to regulate sexually violent conduct.

The court of appeals' reasoning marks a substantial departure from the uniform judicial recognition that the government's authority over persons lawfully in federal custody stands on a different footing than its powers regarding the general population. Pursuant to its power under the Necessary and Proper Clause, U.S. Const. Art. I, § 8, Cl. 18, Congress has carried into execution various of its enumerated powers—*e.g.*, to lay and collect taxes, to regulate interstate commerce, to establish post offices, and to exercise jurisdiction over federal territories and enclaves, *id.* Cls. 1, 3, 7 and 17—by enacting criminal statutes prohibiting and punishing certain conduct. See *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 416-418 (1819) (locating Congress's power to punish most federal crimes in the Necessary and Proper Clause). Congress's power to do so necessarily encompasses the power to imprison or otherwise provide for the custody or supervised release of offenders. The initiation of proceedings for the court-ordered civil commitment of a person who has come into the custody and care of the United States for violation of federal criminal laws, when such a person is mentally ill and dangerous, is a rational incident to the government's undisputed authority under Congress's Article I powers to enact criminal laws, provide for the operation of a penal system, and assume for the United States custodial responsibilities for its prisoners. Thus, it too is within Congress's powers.

a. The Necessary and Proper Clause vests in Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." When Congress legislates in furtherance of a legitimate end, its choice of means is accorded broad deference. See *Sabri* v. *United States*, 541 U.S. 600, 605 (2004) (explaining that *M'Culloch* v. *Maryland* established "review for means-ends rationality under the Necessary and Proper Clause"); see also *Jinks* v. *Richland County*, 538 U.S. 456, 462 (2003) ("[W]e long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be '*absolutely* necessary' to the exercise of an enumerated power."); *Burroughs* v. *United States*, 290 U.S. 534, 547-548 (1934) ("If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.").

b. As described above (see pp. 2-5, *supra*), most of the statutory provisions establishing the federal government's civil-commitment authority date from the late 1940s. Those provisions were specifically intended, among other things, to allow the federal government to provide for the custody of mentally ill persons beyond the expiration of their federal prison sentences, or (in cases in which prosecution was thwarted by reason of mental illness) beyond the point when it is expected that a prosecution for a federal offense will occur. See 18 U.S.C. 4243, 4246.

Section 4248 supplements those provisions by addressing a specific kind of significant threat to public safety: sexual dangerousness manifested in both prior conduct and a present "mental illness, abnormality, or disorder" that will result in a "serious difficulty in refraining from sexually violent conduct or child molestation" if the inmate is released. 18 U.S.C. 4247(a)(5) and (6). Section 4248 also allows federal commitment proceedings to be initiated before the State of the inmate's domicile or the State in which he was tried have been asked whether either wishes to assume custody of the inmate upon release from federal custody. Neither of those modifications to long-established civil-commitment regimes exceeds the legitimate scope of Congress's Article I powers.

One purpose of civil-commitment statutes is "to avert the public danger likely to ensue from the release of mentally ill and dangerous detainees," and in superintending proceedings under those statutes, the courts assume "an awesome responsibility to the public to ensure that a clinical patient's release is safe." *United States* v. *S.A.*, 129 F.3d 995, 999, 1000 (8th Cir. 1997) (citation and internal quotation marks omitted) (holding that Section 4246 authorizes the commitment of a juvenile offender beyond his scheduled release date), cert. denied, 523 U.S. 1011 (1998). While it is true that the federal government has no "plenary police power," *United States* v. *Lopez*, 514 U.S. 549, 566 (1995), that accepted proposition does not call into question the United States' distinct and legitimate interest in protecting the public from threats posed by persons who have been charged with and in many cases convicted of federal crimes and who therefore are already properly in its custody. That legitimate interest of the United States is present whether or not the threatened conduct by a person in its custody would be an independent violation of federal criminal (or noncriminal) law. See *United States* v. *Salerno*, 481 U.S. 739 (1987) (holding that pretrial incarceration of persons under federal indictment was justified by the pendency of certain charges combined with the threat those individuals posed to public safety); *id.* at 747, 750, 755 (referring to Congress's "legitimate" interest in "preventing danger to the community"; Congress's interest in preventing "dangerous acts in the community"; Congress's concern about a person who "presents a demonstrable danger to the community"; "society's interest in crime prevention"; and every government's "concern for the safety and indeed the lives of its citizens").

Congress has provided for the Attorney General to assume custody of such a person—and thereby to assume the responsibility of protecting the public from him and of providing for his supervision, treatment, and care while he is serving a federal sentence. In 2006, as in 1949, Congress permissibly concluded that it is also appropriate—and therefore necessary and proper—to assume the further responsibility of protecting the public from such a person if he is shown to be mentally ill and a danger to society, and to provide for his supervision, treatment, and care—where the most relevant States decline to do so—rather than simply to release the person into society at large.

There is nothing anomalous about such a special solicitude regarding the release of a potentially dangerous person who has been under one's custody and control. The civil-commitment statutes are consistent with the common-law understanding that a custodian may incur responsibilities to third parties when it takes charge of a person who is likely to cause harm if not controlled. See Restatement (Second) of Torts § 319, at 129 (1965) ("One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."); *Hinckley* v. *United States*, 163 F.3d 647, 656 (D.C. Cir. 1999) (noting that that principle provides strong incentives for mental hospitals to act responsibly in authorizing their patients' releases); *Smith* v. *Hope Vill., Inc.*, 481 F. Supp. 2d 172, 197-199 (D.D.C. 2007) (holding that the duty is not extinguished upon an inmate's release from facility). Congress could legitimately conclude that in the circumstances presented here the actions of the federal government should be guided by similar principles of custodial responsibility.

The civil-commitment statutes also further the government's legitimate goal of providing care for persons over whom it has exercised control and for whom it has assumed responsibility. In that capacity, the government's role "is not that of punitive custodian of a fully competent inmate, but benign custodian of one legally committed to it for medical care and treatment—specifically for psychiatric treatment." *United States* v. *Steil*, 916 F.2d 485, 488 (8th Cir. 1990) (quoting *United States* v. *Charters*, 863 F.2d 302, 312 (4th Cir. 1988), cert. denied, 494 U.S. 1016 (1990)); see also *White* v. *Treibly*, 19 F.2d 712, 713 (D.C. Cir. 1927) (holding that the Secretary of the Navy had statutory jurisdiction to civilly commit a former naval officer, noting that his "care and protection" were a "concern and duty of the government").

c. The court of appeals' decision in this case appears to be the first appellate decision to address Congress's constitutional power to provide for the continued commitment in federal custody of mentally ill persons convicted of federal crimes, beyond the expiration of their prison terms. The court of appeals' rationale, however, is difficult to square with this Court's decision in *Greenwood* v. *United States, supra.* In *Greenwood,* this Court upheld—as "plainly within congressional power under the Necessary and Proper Clause"— Congress's power to authorize the federal government to commit someone who has been found incompetent to stand trial, even when it appears that there will never be a trial to determine whether he committed a federal offense. 350 U.S. at 375.

Greenwood resolved a conflict between the Eighth Circuit's decision in that case, *Greenwood* v. *United States*, 219 F.2d 376 (8th Cir. 1955) (en banc), aff'd, 350 U.S. 366 (1956), and earlier rulings of the Ninth and Tenth Circuits. The Tenth Circuit majority in *Wells* v. *Attorney General*, 201 F.2d 556 (1953), followed by the Ninth Circuit in *Higgins* v. *United States*, 205 F.2d 650 (1953), had concluded that the indefinite commitment of an incompetent pretrial detainee who would never be tried impermissibly invaded powers reserved to the States. This Court rejected that limited view of federal authority, and sustained the indefinite commitment of pretrial detainees under the statutory predecessor to 18 U.S.C. 4246, even when—in view of the detainee's medical condition—it was highly unlikely that a trial would ever take place. *Greenwood*, 350 U.S. at 375.[11]

In the decision below, the court of appeals regarded *Greenwood* as irrelevant to the question of Congress's authority to provide for the commitment of persons beyond the end of their prison terms, based on the Court's observation in that decision that the federal government's "power to prosecute" Greenwood was "not exhausted"—because it remained possible, if only theoretically, that Greenwood might at some point be tried. App., *infra*, 18a-19a (quoting *Greenwood*, 350 U.S. at 375). But *Greenwood*'s reference to the government's unexhausted power to prosecute did not represent, as the court of appeals wrongly inferred, an affirmative limitation on federal authority. To the contrary, the Court specifically rejected the contention that the government's authority depended on its actual ability to prosecute Greenwood. *Greenwood*, 350 U.S. at 375. Indeed, as other courts have continued to recognize (see pp. 19-22, *supra*), the primary purpose of the commitment statutes is not to facilitate prosecution but to protect the public and provide care to the person over whom the federal government already has lawfully exercised control. See, *e.g.*, *Greenwood*, 219 F.2d at 387 ("The national government has the undoubted right * * * generally to do whatever reasonably and lawfully can be done to protect society against [federal] offenders.").

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[11] See also *Greenwood*, 350 U.S. at 372 (noting psychiatric report's conclusion that Greenwood "will probably require indefinite hospitalization to insure his own safety and that of society").

In that context, the *Greenwood* Court's reference to an "unexhausted" power to prosecute echoed the language of the dissenting opinion in *Wells*, which had explained that "when the federal government has taken one into lawful custody, under the exercise of valid power, charged with the responsibility of exhausting its jurisdiction over the subject matter as well as the person," it also assumes a "duty to adequately care and provide for" that person if he is found to be insane. 201 F.2d at 561 (Huxman, J., dissenting). By recognizing the risk posed by an insane detainee's release and justifying indefinite commitment even when such a person will likely not be tried, *Greenwood* did not place beyond Congress's power any ability to address the same threats posed by other persons (like most of respondents here) who have not only been indicted but also convicted of federal crimes and imprisoned by the federal government.

The court of appeals' reasoning is also inconsistent with the Ninth Circuit's decision in *United States* v. *Sahhar*, 56 F.3d 1026, cert. denied, 516 U.S. 952 (1995), which involved the extended commitment of a person found incompetent to stand trial. In *Sahhar*, the court rejected the contention that the government's legitimate interest in commitment could last no longer than the maximum sentence permitted for the federal crime for which the defendant had been indicted. In upholding the defendant's "potentially indefinite commitment" against a substantive-due-process challenge, the court explained that "civil commitment of a dangerous and mentally ill person [was justified] because he was in *federal* custody, not because he was in *pretrial* custody.

The fact that an indictment is no longer in place is irrelevant to the governmental interests at stake." *Id.* at 1028, 1029; see also *ibid.* (citing *Jones* v. *United States*, 463 U.S. 354, 368-369 (1983) (holding that an insanity acquittee may continue to be detained, without regard for his "hypothetical maximum sentence," because no "correlation between severity of the offense and length of time necessary for recovery" is required)). As this Court has explained, ongoing civil commitment legitimately "rests on [a detainee's] continuing illness and dangerousness." *Jones*, 463 U.S. at 369.

In light of those principles, Congress could reasonably determine that it is "appropriate"—and therefore "necessary and proper" under *M'Culloch*, *supra*—to protect private persons from sexually dangerous, mentally ill persons whom the federal government has taken into its custody. Moreover, as in *Greenwood*, *Sahhar*, and *S.A.*, that authority need not be limited to what might have been justified by the original ground for federal jurisdiction over the individual.[12] Instead, the government's power depends upon the present threat posed by someone who is mentally ill when his federal prison sentence is about to end. Otherwise, Congress would have been powerless to solve—in both 1949 and 2006—the serious problem presented when the federal government "has lawful custody of a person whom it is not safe to let at large." *Greenwood*, 350 U.S. at 374 (quoting *Judicial Conference Committee Report* 7).

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[12] Although many of the criminal acts that sexually dangerous persons might be expected to commit would violate state law, federal law also criminalizes many acts that constitute the "sexually violent conduct" or "child molestation" associated with the definition of "sexually dangerous" under 18 U.S.C. 4247(a)(6). For example, when acts of sexual abuse occur within the special maritime and territorial jurisdiction of the United States—as was the case with the offenses that caused respondents Vigil and Catron to be in federal custody (App., *infra*, 25a n.2)—they violate federal criminal law. See, *e.g.*, 18 U.S.C. 2241-2245. So too can sexual exploitation of a minor or solicitation of a minor to engage in prostitution or sexual activity, when the internet or interstate travel is involved. See, *e.g.*, 18 U.S.C. 2251.

3. The court of appeals concluded that Section 4248 is not necessary and proper to the operation of the federal criminal-justice and penal system because it impermissibly infringes upon the "broad powers" reposed in States pursuant to "their well-settled police and *parens patriae* powers to pursue civil commitment under state law." App., *infra*, 20a-21a. That conclusion, however, was based upon erroneous assumptions about the range of legitimate federal power and about the extent of the alleged intrusion on the States.

a. The court of appeals principally rejected the government's Necessary and Proper Clause argument on the ground (App., *infra*, 13a-15a) that "broad powers" over inmates—which the federal government concededly "possesses * * * over persons *during* their prison sentences"—fully revert from the federal government to the States the moment the inmates' federal prison terms expire. *Id.* at 14a. But that purported dichotomy is a false one. Indeed, it is contradicted by the typical terms of federal criminal sentences, which often provide (as in this case) that a term of imprisonment will be followed by a period of "supervised release."[13] See generally 18 U.S.C. 3583.

The conditions associated with supervised release routinely extend far beyond the kinds of regulations that the federal government could impose on members of the general population, including the requirement "that the defendant not commit another Federal, *State, or local* crime during the term of supervision." 18 U.S.C. 3583(d) (emphasis added). A violation of those conditions can result in revocation of supervised release and a return to federal prison. 18 U.S.C. 3583(e)(3). That statutory framework belies the court of appeals' conclusion that "[t]he fact of previously lawful federal custody simply does not, in itself, provide Congress with any authority to regulate future conduct that occurs outside of the prison walls." App., *infra*, 14a; cf. *id.* at 15a-16a ("[M]any commitments under § 4248 would prevent conduct prohibited *only* by *state law*. Section 4248 thus sweeps far too broadly to be a valid effort to prevent *federal* criminal activity."). The terms of supervised release are authorized as part of the original criminal sentence and do not depend on any additional civil-commitment authority. But they nevertheless underscore the United States' distinct relationship with federal convicts, as well as its ability to take special measures to protect the public from harm that might result from the release of those convicts, even when that harm might arise from conduct that would often be beyond federal regulatory power.

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[13] As noted above, four of the respondents in this case will be subject to three-year terms of supervised release once they are released from physical custody. App., *infra*, 24a, 25a n.2.

b. The court of appeals also erred in characterizing Section 4248 as an impermissible intrusion on the States' own powers of civil commitment. Adverting briefly (App., *infra*, 19a) to a point made at greater length in the district court's opinion (*id.* at 63a-67a), the court of appeals contrasted Section 4248 with Section 4246, the constitutionality of which was sustained by this Court as to the petitioner in *Greenwood*. Only the latter provision, both of the lower courts noted, requires the federal government to exhaust potential arrangements for state custody *before* initiating federal commitment proceedings against a federal inmate who is about to be released.[14] Compare 18 U.S.C. 4246(a), with 18 U.S.C. 4248(a).

Of course, Section 4248, like the provisions enacted in 1949, provides for ongoing federal custody and treatment only when no suitable state arrangements are available. See 18 U.S.C. 4248(d). It cannot be of constitutional significance whether the States of the inmate's domicile or trial are consulted before or after the federal government has undertaken to prove in court that a person in federal custody is in fact sexually dangerous. As an initial matter, it plainly imposes less of a burden on a State to ask it to accept custody of someone whose sexual dangerousness has already been adjudicated than it does to ask the State to decide on initiating its own commitment proceedings against someone who has been in federal custody, perhaps for years, and about whom the State may well know next to nothing.

Similarly, the State's discretionary decision whether to assume custody cannot determine whether a federal commitment proceeding falls within Congress's powers. The exercise of Article I powers does not depend on a State's approval. See, *e.g.*, *Gonzales* v. *Raich*, 545 U.S. 1, 29 & n.38 (2005); see also *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919).[15] If an action is appropriate under the Necessary and Proper Clause, the federal government need not defer to a State or ask for its permission.

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[14] Notwithstanding the contrast with Section 4246, the timing of state involvement under Section 4248 is not novel. The government need not certify the lack of suitable arrangements for state custody before seeking a court-ordered commitment under 18 U.S.C. 4243 of a person who has been found not guilty only by reason of insanity.

[15] In the context of civil-commitment decisions, the history of *Greenwood* itself makes clear that the federal government is not required to defer to state determinations of sanity for persons over whom it has

4. Finally, in holding Section 4248 unconstitutional in the case of respondent Catron (App., *infra*, 18a n.10), the court of appeals invalidated an application of the statute that survives scrutiny even under that court's own erroneous view of Congress's authority.

Catron was deemed incompetent to stand trial after being charged with four counts of aggravated sexual abuse of a minor under the age of twelve and one count of abusive sexual conduct, and he was in custody under 18 U.S.C. 4241(d) when he was certified as sexually dangerous under Section 4248. The court of appeals recognized that, even under its circumscribed reading of *Greenwood*, Congress's assertion of authority over persons in Catron's situation would be proper because there was still an "unexhausted" power of federal prosecution. App., *infra*, 19a n.10 (noting that commitment under Section 4246 "would lie within [the government's] constitutional authority"). The court nevertheless declared: "Because no party asks us to bifurcate Catron's unique challenge to § 4248, we decline to do so." *Ibid.* The court of appeals' premise that the government did not separately defend custody under Catron's different cir-

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jurisdiction. In *Greenwood*, after commencing commitment proceedings, the federal district court transferred Greenwood to a state facility. 350 U.S. at 371. The State then concluded that Greenwood was *not* insane and released him. *Ibid.* Greenwood was re-arrested under a federal indictment. *Ibid.* In ordering Greenwood's indefinite commitment, the federal court did not consider itself limited or bound by the State's ruling, and this Court did not suggest that it was required to defer to the state court's sanity determination or that the federal government had violated principles of federalism by indefinitely committing a person deemed sane by the State. *Id.* at 371-372.

cumstances is incorrect. Catron's case was one of five separate cases that the court of appeals consolidated for purposes of appeal, and the government's briefs included separate discussions of the constitutionality under *Greenwood* of Section 4248 as applied to "individuals, like respondent Catron, found incompetent to stand trial and committed to federal custody under § 4241(d)." Gov't C.A. Br. 37 (capitalization modified); see also *id.* at 37-41; C.A. Reply Br. 20.

The court of appeals thus erred in ordering that Catron's case be dismissed on a constitutional ground (*i.e.*, the alleged exhaustion of the federal prosecution power) that the court itself recognized was inapplicable to the Section 4248 proceeding against Catron.[16] Cf. Resp. C.A. Br. 56 ("[T]he federal government's power to prosecute, as described in *Greenwood*, remains solely for Catron."). That invalidation of civil-commitment proceedings under Section 4248 for persons found incompetent under Section 4241(d) likewise should be reviewed and reversed by this Court.

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[16] The district court suggested (App., *infra*, 37a & n.7) that Greenwood's case was distinguishable from respondent Catron's because the older statute required a "potential harm to the 'interests of the United States.'" As the government argued below (Gov't C.A. Br. 40), that rationale conflicts with decisions correctly construing the older statute as authorizing commitment when "release would endanger the safety of persons, property or the public interest in general—not merely the interests peculiar to the United States as such." *United States* v. *Curry*, 410 F.2d 1372, 1374 (4th Cir. 1969) (citing *Royal* v. *United States*, 274 F.2d 846, 851-852 (10th Cir. 1960)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2009

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-7671

UNITED STATES OF AMERICA,
PETITIONER-APPELLANT

v.

GRAYDON EARL COMSTOCK, JR.,
RESPONDENT-APPELLEE

No. 07-7672

UNITED STATES OF AMERICA,
PETITIONER-APPELLANT

v.

SHANE CATRON, RESPONDENT-APPELLEE

No. 07-7673

UNITED STATES OF AMERICA,
PETITIONER-APPELLANT

v.

THOMAS MATHERLY, RESPONDENT-APPELLEE

No. 07-7674

UNITED STATES OF AMERICA,
PETITIONER-APPELLANT

v.

MARVIN VIGIL, RESPONDENT-APPELLEE

No. 07-7675

UNITED STATES OF AMERICA,
PETITIONER-APPELLANT

v.

MARKIS REVLAND, RESPONDENT-APPELLEE

Decided: Jan. 8, 2009

Before MOTZ and AGEE, Circuit Judges, and JAMES C. CACHERIS, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

This case presents the question of whether a newly enacted federal statute—18 U.S.C. § 4248 (2006)—lies within Congress's power. Section 4248 purports to allow the federal government to place in indefinite civil commitment "sexually dangerous" persons, granting the federal government unprecedented authority over civil commitment—an area long controlled by the states. The district court held that § 4248 exceeds the limits of congressional power and intrudes on the powers reserved to the states. The Government now appeals.

We are the first appellate court to address this question, but the issue has divided trial courts across the nation. *Compare United States v. Tom*, 558 F. Supp. 2d 931, 938, 941 (D. Minn. 2008) (holding that Congress lacked authority to enact § 4248), *and United States v. Comstock*, 507 F. Supp. 2d 522, 540 (E.D. N.C. 2007) (same), *with United States v. Abregana*, 574 F. Supp. 2d 1123, 1133-34 (D. Haw. 2008) (holding that Congress had authority to enact § 4248), *United States v. Dowell*, No. CIV-06-1216-D, 2007 WL 5361304 at *7, (W.D. Okla. Dec. 5, 2007) (same), *United States v. Shields*, 522 F. Supp. 2d 317, 328 (D. Mass. 2007) (same), *and United States v. Carta*, 503 F. Supp. 2d 405, 407-08 (D. Mass. 2007) (same).

Two fundamental principles guide our inquiry. On one hand, respect for the legislative branch demands that we afford congressional enactments a "presumption of constitutionality." *United States v. Morrison*, 529 U.S. 598, 607, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000). But on the other, we must invalidate an act of Congress on a "plain showing" that Congress has exceeded its constitutional authority. *Id.*

After carefully considering the Government's arguments, we conclude, for the reasons set forth below, that § 4248 does indeed lie beyond the scope of Congress's authority. The Constitution does not empower the federal government to confine a person solely because of asserted "sexual dangerousness" when the Government need not allege (let alone prove) that this "dangerousness" violates any federal law. We therefore affirm the judgment of the district court.[1]

I.

A.

Congress enacted § 4248 as part of the Adam Walsh Child Protection and Safety Act of 2006 ("the Act"). *See* Pub. L. No. 109-248, § 302, 120 Stat. 587, 620-22. With the aim of "protect[ing] children from sexual exploitation and violent crime," *id.* at 587, a Senate sponsor described the Act as "the most comprehensive child crimes and protection bill in our Nation's history." 152 Cong. Rec. S8012 (daily ed. July 20, 2006) (statement of Sen. Hatch). Among other measures, the Act creates a National Sex Offender Registry, *see* § 119, 120 Stat. at 596 (codified at 42 U.S.C. § 16919 (2006)), increases punishments for a variety of federal crimes against children, *see, e.g.*, § 206, 120 Stat. at 613 (codified as amended at 18 U.S.C. § 2241 (2006)), and strengthens existing child pornography prohibitions, *see, e.g.*, § 506, 120 Stat. at 630-31 (codified as amended at 18 U.S.C. § 1465 (2006)). None of these provisions of the Act is challenged here.

The only portion of the Act at issue here, § 4248, authorizes the federal government to civilly commit, in a federal facility, any "sexually dangerous" person "in the custody" of the Bureau of Prisons—even *after* that person has completed his entire prison sentence. 18 U.S.C. § 4248(a), (d) (2006). To initiate commitment under § 4248, the Attorney General need only certify that a person within federal custody is "sexually dangerous." Such a certification, when filed with the district court in the jurisdiction in which the federal government holds a person, automatically stays that person's release from prison. *Id.* § 4248(a). In the cases at issue here, this stay has extended federal confinement well past the end of any prison term. Thus, pursuant to § 4248, the federal government has civilly confined former federal prisoners without proof that they have committed any new offense. Moreover, § 4248 empowers the Attorney General to prolong federal detention in this manner without presenting evidence or making any preliminary showing; the statute only requires that the certification contain an allegation of dangerousness.

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[1] Because we find § 4248 unconstitutional on this basis, we need not reach the other challenges to the statute and express no opinion on the district court's disposition of those issues.

The statute defines a "sexually dangerous person" to be one who "has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others," and who suffers from a severe mental illness such that he would "have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. § 4247(a)(5)-(6) (2006). However, neither "sexually violent conduct" nor "child molestation" are terms defined by the statute.[2]

After the Attorney General files the certification, § 4248 directs the district court to adjudicate a person's alleged sexual dangerousness. *Id.* § 4248(a). If the district court finds the person to be sexually dangerous by clear and convincing evidence, the court must commit the person to federal custody. *Id.* § 4248(d). *Only then* does § 4248 direct the Attorney General to make "all reasonable efforts" to transfer responsibility for the person to an appropriate *state* authority. *Id.* Unless and until a state assumes this responsibility, § 4248 authorizes federal confinement for as long as the person remains "sexually dangerous." *Id.*

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[2] In contrast to the undefined commitment criteria of § 4248, many state civil commitment statutes related to "sexually dangerous persons" are more narrowly drawn. For example, a proceeding for civil commitment of a "sexually violent predator" under Virginia law cannot be commenced unless the person "has been convicted of a sexually violent offense." Va. Code Ann. § 37.2-900 (2008). The statute specifically defines those offenses.

B.

Graydon Comstock, who filed the first of these consolidated challenges to § 4248, pled guilty to receipt of child pornography in violation of 18 U.S.C. § 2252(a)(2) (2006). Six days prior to the end of his 37-month prison sentence, the Attorney General certified Comstock as a sexually dangerous person, staying his release from prison. More than two years later, Comstock remains confined in the medium security Federal Correctional Institution at Butner, North Carolina ("FCI-Butner").

The cases of Markis Revland, Thomas Matherly, and Marvin Vigil followed a similar course, with the Government certifying each man for federal commitment less than one month before he completed his full prison term.[3] In fact, the Government certified Vigil for civil commitment on the very same day that he had completed his 96-month term of imprisonment. Like Comstock, each of these men remains in federal custody at FCI-Butner more than two years after the expiration of his prison term.

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[3] The Attorney General has certified, under § 4248, more than 60 persons in the Eastern District of North Carolina alone, all of whom (as of this writing) remain in the federal prison complex in Butner, North Carolina. With one exception (Shane Catron, whose case we address in footnote 10), each of these persons had already served all, or almost all, of his prison term when the Attorney General certified him for this additional confinement. *See* Brief of Appellee at Appendix A; *see also United States v. Wilkinson*, No. 07-12061-MLW, 2008 WL 427295, at *1-3 (D. Mass. Feb. 14, 2008) (finding that all of the § 4248 cases filed

As part of each certification, the Government petitioned for a hearing to determine whether the named person qualified as "sexually dangerous" under § 4248. In each case, the named person then moved to dismiss, contending that § 4248 violates the Constitution. The district court agreed and held that § 4248's civil commitment scheme could not withstand constitutional scrutiny. *Comstock,* 507 F. Supp. 2d at 530-40.

With this background in mind, we turn to the question presented in this case: whether the Constitution grants Congress the authority to enact § 4248.

II.

In the exercise of their general police and *parens patriae* powers, the states have long controlled the civil commitment of the mentally ill. *See, e.g., United States v. Sahhar,* 56 F.3d 1026, 1029-30 (9th Cir. 1995); *United States v. Cohen,* 733 F.2d 128, 150 (D.C. Cir. 1984) (en banc) (MacKinnon, J., concurring) ("[The] care and commitment of the insane is, and has been, a uniquely State function."); Note, *Federal Hospitalization of Insane Defendants Under Section 4246 of the Criminal Code,* 64 Yale L.J. 1070, 1070 (1955) ("Power over the general field of insanity resides exclusively in the states as *parens patriae* . . . . "). Unlike the states, the federal

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in the District of Massachusetts involved certifications "just before the expiration of the [prisoner's] sentence" and urging the government to end this practice).

government has no general police or *parens patriae* power. *United States v. Lopez*, 514 U.S. 549, 566, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995).

Nonetheless, in the statute at issue here, Congress purports to grant the federal government broad civil commitment authority.[4] This raises a substantial constitutional question because the Constitution requires that a specific enumerated power support every statute enacted by Congress. *Morrison*, 529 U.S. at 607, 120 S. Ct. 1740. The Government does not argue to the contrary.

Yet the Government attempts to defend the validity of § 4248 largely by direct reliance on the Necessary and Proper Clause. U.S. Const. art. I, § 8, cl. 18. But that provision, by itself, creates *no* constitutional power; rather, it merely permits Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers *vested by this Constitution* in the Government of the United States . . . ."

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[4] Section 4248 is not Congress's first attempt to assert federal power over civil commitment—but prior Attorneys General have concluded that the Constitution does not authorize such broad measures. In 1857, for example, Congress enacted a statute authorizing the hospitalization of incompetents charged with federal crimes. Act of Feb. 15, 1857, ch. 36, § 5, 11 Stat. 157, 158. But the Attorney General—adhering to precisely the same constitutional limits at issue in this case—concluded that the federal government could apply this statute *only* to persons within exclusive federal jurisdiction (e.g., residents of the District of Columbia and members of the military). 17 Op. Att'y Gen. 211 (1881). And, in 1874, Congress sought to provide, as § 4248 does, for the hospitalization of federal convicts found to be insane at the termination of their sentences. Act of June 23, 1874, ch. 465, § 2, 18 Stat. 251, 251-52. The Attorney General concluded that the federal government could not constitutionally detain a federal prisoner after the termination of his sentence, 30 Op. Att'y Gen. 569 (1916), and Congress codified this limitation in 1930. Act of May 13, 1930, ch. 254, § 6, 46 Stat. 270, 271.

Id. (emphasis added). Thus, to sustain § 4248 under the Necessary and Proper Clause, the Government must show that the statute is necessary to achieve ends within Congress's enumerated powers. *See Sabri v. United States*, 541 U.S. 600, 605, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004).

Perhaps implicitly recognizing this deficiency in its Necessary and Proper Clause arguments, the Government also relies (albeit briefly) on the Commerce Clause.[5] Unlike the Necessary and Proper Clause, the Commerce Clause does vest Congress with enumerated constitutional power. Clearly, if we can uphold § 4248 as a valid exercise of Congress' Commerce Clause powers, the statute lies within congressional authority. Accordingly, consistent with the "presumption of constitutionality," *Morrison*, 529 U.S. at 607, 120 S. Ct. 1740, that we afford every federal statute, we begin our analysis by addressing this question.

A.

The Commerce Clause empowers Congress "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3.

Recent Supreme Court precedent provides substantial assistance in resolving the question of whether the Commerce Clause authorizes § 4248. First, in *United States v. Lopez*, the Court held that the Gun-Free School

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[5] The Government barely mentions the Commerce Clause in its lengthy briefs. But when questioned at oral argument—after initially asserting that a "variety of [enumerated] powers" supported the challenged statute—the Government could identify *only* the Commerce Clause as the specific enumerated constitutional power that authorized enactment of § 4248.

Zones Act (GFSZA) of 1990, which made possession of a firearm in a school zone a federal crime, exceeded Congress's Commerce Clause power because it regulated neither commercial nor interstate activity. 514 U.S. at 551, 115 S. Ct. 1624. Then, in *Morrison*, the Court imposed further limits on Congress's Commerce Clause power, holding unconstitutional a provision of the Violence Against Women Act (VAWA) that created a federal civil remedy for noneconomic sexual violence, because such crimes do not substantially affect interstate commerce. 529 U.S. at 601-02, 614-18, 120 S. Ct. 1740.

In these cases, the Court identified three specific areas that Congress could regulate pursuant to its Commerce Clause power: (1) the channels of interstate commerce, (2) instrumentalities of or persons and things in interstate commerce, and (3) activities that "substantially affect" interstate commerce. *See, e.g.*, *Lopez*, 514 U.S. at 558-59, 115 S. Ct. 1624. Like the statutes at issue in *Lopez* and *Morrison*, the statute challenged here, § 4248, contains no jurisdictional requirement limiting its application to commercial or interstate activities. Nor does the Government suggest that § 4248 targets the channels of interstate commerce or persons and things in interstate commerce. Therefore, we can uphold § 4248 under the Commerce Clause only if it regulates activities that "substantially affect" interstate commerce. *See Morrison*, 529 U.S. at 609, 120 S. Ct. 1740.

Morrison forecloses any such argument. Indeed, § 4248 bears striking similarities to the VAWA provision struck down in *Morrison*. First, like VAWA, § 4248 provides a civil remedy aimed at the prevention of noneconomic sexual violence. The *Morrison* Court's rationale for rejecting Commerce Clause authority for such a statute applies with equal force here:

> The regulation and punishment of intrastate violence . . . has always been the province of the States. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.

Id. at 618-19, 120 S. Ct. 1740 (citations omitted).

Second, the target of the statute challenged here (sexual dangerousness)—no less than the target of the statute invalidated in *Morrison* (gender-motivated violence)—is "not, in any sense of the phrase, economic activity." *Id.* at 613, 120 S. Ct. 1740. Like the gender motivated violence banned in *Morrison*, sexual dangerousness does not substantially affect interstate commerce. Indeed, unlike *Morrison*, the record here does not even contain any legislative findings to the contrary.

Supreme Court precedent thus compels the conclusion that § 4248 does not constitute a valid exercise by Congress of its Commerce Clause power.[6] To construe

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[6] As the Government acknowledges, nothing in the Supreme Court's most recent Commerce Clause opinion, *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005), alters the core holding in *Morrison* that Congress lacks authority to regulate noneconomic sexual violence. The *Raich* Court sustained the drug prohibitions of the Controlled Substances Act (CSA) as applied to the intrastate cultivation and use of medical marijuana. *Id.* at 13, 32-33, 125 S. Ct. 2195 Relying on the rationale of *Wickard v. Filburn*, 317 U.S. 111, 63 S. C [illegible] 87 L. Ed. 122 (1942), the Court reasoned that Congress could regulate this purely local activity as part of regulating "an economic class of activities that have a substantial effect on interstate commerce." *Raich*, 545 U.S. at 17, 125 S. Ct. 2195 (internal quotations omitted). In contrast to the

§ 4248 as within such power would encroach on the police and *parens patriae* powers reserved to the sovereign states, conflating "what is truly national and what is truly local." *Id.* at 617-18, 120 S. Ct. 1740; *see also Cohen*, 733 F.2d at 138 (Scalia, J.) ("'[A] Federal procedure for the commitment of the [mentally ill] would constitute an inappropriate interference with the balance of Federal and State powers . . . . [T]he care of the mentally ill is a task that uniquely belongs within the *parens patriae* powers of the States.'" (*quoting* H.R. Rep. No. 96-1396, at 561 (1980))).

Federal commitment of "sexually dangerous persons" may well be—like the suppression of guns in schools or the redress of gender-motivated violence—a sound proposal as a matter of social policy. But policy justifications do not create congressional authority. *Morrison*, 529 U.S. at 627, 120 S. Ct. 1740. Hence § 4248 lies beyond Congress's Commerce Clause authority. The Government's apparent reluctance to rely on the Commerce Clause is thus understandable.

B.

What is less understandable is the Government's heavy reliance on the Necessary and Proper Clause, standing alone, as a source of congressional power. Of course, as the Government contends at length, the Necessary and Proper Clause reaches broadly, but it does so only to effectuate powers specifically enumerated in the Constitution. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414-21, 4 L. Ed. 579 (1819). The Necessary

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CSA, § 4248 constitutes no part of a "comprehensive" legislative scheme that targets interstate markets. *Id.* at 22, 125 S. Ct. 2195.

and Proper Clause simply does not—in and of itself—create any Congressional power. *See Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247, 80 S. Ct. 297, 4 L. Ed. 2d 268 (1960) ("The [Necessary and Proper Clause] is not itself a grant of power, but a caveat that the Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of § 8 [of Article I of the Constitution.]"). Ordinarily, this would end our discussion of the Necessary and Proper Clause. But because the Government's defense of § 4248 relies almost exclusively on that Clause, we briefly address each of its specific arguments on this point.

1.

The Government's principal argument is that its ability to establish and maintain a "federal criminal justice and penal system" somehow renders § 4248 necessary and proper and thus constitutional. *See* Brief of Appellant at 14, 20, 21, 30, 32, 34, 42; Reply Brief of Appellant at 2, 6, 7, 10, 16. The Government cites *no* precedent in support of this novel theory. Instead, the Government relies on a restatement provision setting forth common law principles on the responsibilities of custodians. *See* Brief of Appellant at 30 (*quoting* Restatement (Second) of Torts § 319 (1965)); Reply Brief of Appellant at 11-12 (same). In essence, the Government argues that because it may constitutionally imprison persons who violate federal criminal law, it can continue to confine such persons—even after they have served their sentences—if it believes them to be "sexually dangerous."

This argument must fail. Of course, Congress may establish and run a federal penal system, as necessary and proper to the Article I power (usually the Commerce Clause) relied on to enact federal criminal statutes. And, consistent with its role in maintaining a penal system, the federal government possesses broad powers over persons *during* their prison sentences. But these powers are far removed from the indefinite civil commitment of persons *after* the expiration of their prison terms, based solely on possible future actions that the federal government lacks power to regulate directly.[7]

The fact of previously lawful federal custody simply does not, in itself, provide Congress with any authority to regulate future conduct that occurs outside of the prison walls. For example, although the Government may regulate assaults occurring in federal prisons, the Government cannot criminalize all assaults committed by *former* federal prisoners. As the district court explained:

> The fact of legitimate custody . . . does not establish Congressional authority to provide for the commitment of a person *after* a person has completed a

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[7] We further note that the expansive view of "custody" that the Government itself has urged in other § 4248 cases belies its contention that § 4248 constitutes a limited, necessary extension of the federal penal system. For example, in *United States v. Shields*, the Government maintained that § 4248 requires only that a person is "in custody" of the Bureau of Prisons, not that this custody is lawful. *See* Government's Mem. in Opp'n to Mot. to Dismiss at 1-3, *United States v. Shields*, No. 07-12056 (D. Mass. Nov. 13, 2007). Similarly, in a case currently on appeal before the Seventh Circuit, the Government argues that § 4248 validly applies to persons whom the federal government has never convicted of a crime—a rationale that would extend § 4248's reach to material witnesses, civil contempt detainees, and individuals in immigration detention. *See United States v. Hernandez-Arenado*, No. 08-278, 2008 WL 2373747, at *3-5 (S.D. Ill. June 9, 2008). These arguments starkly conflict with the Government's attempt here to justify § 4248 as a narrow exercise of federal *penal* power.

> sentence for a federal crime, i.e., when the power to prosecute federal offenses is exhausted, when that person has not committed any misconduct while in custody, and where there has been no showing that the person is likely to engage in conduct that Congress, as opposed to the states, actually has the authority to criminalize.

Comstock, 507 F. Supp. 2d at 551.

2.

The Government next contends that § 4248 constitutes a necessary and proper exercise of its power to prevent "sex-related crimes." Brief of Appellant at 36. But the federal government simply has no power to broadly regulate *all* sex-related crimes, as § 4248 purports to do.

Consistent with Congress's limited powers, federal statutes regulating sex crimes are limited in number and breadth, specifically requiring a connection to interstate commerce, *see, e.g.*, 18 U.S.C. § 2252(a)(2) (2006), or limiting their scope to the territorial jurisdiction of the United States, *see, e.g.*, *id.* § 2243(a). In contrast, § 4248 targets "sexual dangerousness" generally, without any requirement that this undefined danger relate to conduct that the federal government may constitutionally regulate. Because most crimes of sexual violence violate state and not federal law,[8] many commitments under

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[8] Even a cursory review of federal and state prison statistics demonstrates this fact. In 2004, states had in their custody approximately 153,800 prisoners convicted of rape or other sexual assault. *See* William J. Sabol et al., U.S. Dep't of Justice, *Prisoners in 2006*, at 24 app. tbl.9 (2007), *available at* http://www.ojp.gov/bjs/pub/pdf/p06.pdf. This number is approximately equal to the total number of persons in federal

§ 4248 would prevent conduct prohibited *only* by *state law*. Section 4248 thus sweeps far too broadly to be a valid effort to prevent *federal* criminal activity.

The principal case on which the Government relies for its argument to the contrary, *United States v. Perry*, 788 F.2d 100 (3d Cir. 1986), actually offers it no support. Notably, at the outset, the *Perry* court recognized (as the Government fails to here) that a specific, enumerated federal power must support a federal civil commitment:

> [T]he federal government may resort to civil commitment when such commitment is necessary and proper to the exercise of some specific federal authority. *Congress may not, however, authorize commitment simply to protect the general welfare of the community at large.*

Id. at 110 (emphasis added). Applying this test, Perry upheld the constitutionality of the Bail Reform Act of 1984, which authorizes *pretrial* detention only if a court finds a likelihood that the detainee will, if released, commit one of *four specific federal offenses*. *Id.* at 111. The Bail Reform Act therefore contained a clear connection

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prison for any crime. *See id.* at 2 tbl.1 (indicating approximately 188,000 total federal inmates in 2005). Those convicted of sexual crimes constitute a very small percentage of the federal total. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Compendium of Federal Justice Statistics, 2003*, at 62 tbl.4.2 (2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs 03.pdf (indicating that federal convictions for violent sexual offenses, "obscene material," and "non-violent sex offenses," together, constituted less than 2% of all federal convictions).

between the *pretrial* detentions and the Government's interest in preventing federal crime.[9]

In contrast, § 4248 contains no such connection: it does not refer to any federal crime, let alone require the Government to demonstrate that a person presents a risk of committing a specific federal crime. Indeed, under § 4248, the federal government may commit a person even though he has never been convicted by any court—state or federal—of any crime of sexual violence. Section 4248 only requires that the Government demonstrate that an individual in United States custody is "sexually dangerous," which encompasses *any* "sexually violent conduct"—regardless of whether state or federal law criminalizes this conduct. *See* 18 U.S.C. § 4247(a)(6) (2006).

At its core, the Government's argument attempts to "pile inference upon inference" so as to "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567, 115 S. Ct. 1624. Were we to accept the Government's logic, Congress could authorize the civil commitment of a person on a showing that he posed a general risk of *any* sexually violent conduct, even though not all, or even most, of this potential conduct violated federal law. This argument would convert the federal government's limited power to criminalize narrow forms of sexual violence into the general power to regulate all sexual violence, including acts which violate no criminal statute. Congressional power does not reach so far.

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[9] *United States v. Plotts*, 347 F.3d 873 (10th Cir. 2003), offers the Government even less support. *Plotts* held a statute requiring that individuals convicted of federal crimes provide DNA samples was constitutional under Congress's power " to fashion *penalties* for the violation of valid *federal laws*," or because of its power "to aid the Executive in prosecuting those who . . . *violate federal criminal laws*." *Id*. at 879 (emphasis added). Neither of these rationales supports § 4248, because commitment under § 4248 constitutes no part of a person's "penalt[y]" or "prosecut[ion]" for the violations of "federal criminal laws."

3.

Finally, the Government maintains that the Necessary and Proper Clause justifies § 4248 because it retains the "power to prosecute" all persons in its custody charged with criminal offenses. But the Government has already charged, tried, and convicted Comstock, Matherly, Vigil, and Revland of all alleged federal crimes; it retains no power to prosecute them.

Greenwood v. United States, 350 U.S. 366, 76 S. Ct. 410, 100 L. Ed. 412 (1956), on which the Government heavily relies, does not suggest, let alone hold, to the contrary. Rather, *Greenwood* simply upholds a statute that permits the federal civil commitment of a person charged with federal crimes *but found incompetent to stand trial. Id.* at 367-68, 375, 76 S. Ct. 410. To prevent "frustrat[ion]" of federal prosecutions in such cases, *Greenwood* authorizes the commitment of these incompetent individuals, reasoning that they might someday regain competence and so be able to stand trial. *Id.* at 375, 76 S. Ct. 410 ("The power that put [the accused] into [federal] custody—the power to prosecute for federal offenses—is not exhausted.").[10] Furthermore, the statute upheld in *Greenwood* requires the Attorney General to determine that "suitable arrangements for *State* custody and care of the person are *not* available" *before* the federal government can undertake any commitment. 18 U.S.C. § 4246(a) (2006) (emphasis added).

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[10] For example, a federal judge found Shane Catron—the fifth person who challenges § 4248 here—incompetent to stand trial before the Government could prosecute him for his alleged criminal offenses. This frustrated the Government's power to prosecute Catron. Thus, as Catron concedes, § 4246 (the statute at issue in *Greenwood*) empowers the Government to certify and detain him in a federal facility until he re-

In sum, *Greenwood* only approved the federal civil commitment of persons who had been charged with federal crimes but found incompetent to stand trial, and for whom no state would take custody. *Greenwood* certainly did not approve the federal civil commitment of persons—like Comstock, Matherly, Vigil, and Revland—who have stood trial, been convicted, and fully served all federal prison sentences.[11] Accordingly, because no fed-

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gains competence. Had the Government held to its original course of committing Catron pursuant to § 4246, its actions would lie within its constitutional authority. But, for unexplained reasons, the Government chose to withdraw its § 4246 certification of Catron and instead certified him pursuant to § 4248. The seemingly unique circumstances of Catron's case differ greatly from those applicable to the four other appellees in this case, and to all of the more than 60 other individuals committed under § 4248 in this circuit. Because no party asks us to bifurcate Catron's unique challenge to § 4248, we decline to do so. As the Supreme Court has noted, when the parties do not ask for such "finely drawn" relief, we need not embark on such a course. *See Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330-31, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006). We note that § 4246 also purports to allow the federal government to confine indefinitely persons in federal custody whose sentences have expired. But that provision was neither at issue nor addressed by the Supreme Court in *Greenwood*, similarly, it is not at issue here and we too decline to address it.

[11] Although the Government notes in passing that Comstock, Matherly, Vigil, and Revland remain subject to supervised release, it does not allege that they have violated the terms of supervised release or any other federal law. Of course, the Government has no unexhausted power to prosecute a *former* federal prisoner simply because he *could* vio-

eral prosecution has been frustrated here, we cannot sustain § 4248 under *Greenwood*.

III.

For these reasons, we can only conclude that the district court correctly held § 4248 unconstitutional. The challengers have made a "plain showing" that, in enacting § 4248, Congress exceeded its constitutional authority. *Morrison*, 529 U.S. at 607, 120 S. Ct. 1740.

Our holding, however, does not require that the Government's legitimate policy concerns go unaddressed. If the federal government has serious concerns about the dangerousness of a person due to be released from federal prison, it can notify state authorities, who may use their well-settled police and *parens patriae* powers to pursue civil commitment under state law. *See* generally *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

Moreover, if the relevant state authorities prove reluctant to take charge of such persons, the Government is not without recourse. The federal government may, for example, wield its spending power to encourage state action, *see* U.S. Const. art. I, § 8, cl. 1 (granting Congress the power to allocate funds to promote the "general Welfare"), by providing funding to state institutions for this purpose. *Cf. South Dakota v. Dole*, 483 U.S. 203, 209-12, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987). But Congress's perceived need for the sort of civil commitment statute at issue here does not create constitutional power where none exists. *See Morrison*, 529 U.S. at 627, 120 S. Ct. 1740. Congress must instead seek alternative,

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late a term of his supervised release; any person *could* violate federal law.

constitutional means of achieving what may well be commendable objectives.

The power claimed by § 4248—forcible, indefinite civil commitment—is among the most severe wielded by any government. The Framers, distrustful of such authority, reposed such broad powers in the states, limiting the national government to specific and enumerated powers. "[T]hat those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L. Ed. 60 (1803). Section 4248 thus cannot be sustained as an exercise of Congress's authority under the Commerce Clause or any other provision of the Constitution. For these reasons, we affirm the judgment of the district court.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA WESTERN DIVISION

No. 5:06-HC-2195-BR

UNITED STATES OF AMERICA, PETITIONER

v.

GRAYDON EARL COMSTOCK, JR., RESPONDENT

No. 5:06-HC-2202-BR

UNITED STATES OF AMERICA, PETITIONER

v.

SHANE CATRON, RESPONDENT

No. 5:06-HC-2205-BR

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS MATHERLY, RESPONDENT

No. 5:06-HC-2206-BR

UNITED STATES OF AMERICA, PETITIONER

v.

MARVIN VIGIL, RESPONDENT

No. 5:06-HC-2212-BR

UNITED STATES OF AMERICA, PETITIONER

v.

MARKIS REVLAND, RESPONDENT

Sept. 7, 2007

BRITT, Senior District Judge.

In July 2006, Congress enacted the Adam Walsh Child Protection and Safety Act of 2006 (the Walsh Act), Pub. L. No. 109-248, 120 Stat. 587 (2006), to combat sexual violence and the exploitation, molestation, and abuse of children in this country. Described by Senator Orrin Hatch as the "most comprehensive child crimes and protection bill in our Nation's history," 152 Cong. Rec. S8012 (2006), the Act creates a National Sex Offender Registry with uniform registration standards, creates criminal penalties for individuals who fail to comply with the Act's registration requirements, increases federal criminal penalties for violent and sexually violent crimes against children, provides grants to states to help states institutionalize sex offenders who have shown they are unable to control their behavior, creates a task force that will take action to make it more difficult for sexual predators to reach children on the Internet, and establishes a National Child Abuse registry. Much of the legislation is designed to close the gap between federal and state efforts to identify, track, and confine sexual predators.

Respondents' motions to dismiss in these cases present the court with questions of constitutional authority and substantive due process, among others, with respect to only one provision of the Walsh Act,[1] that which permits the civil commitment of sexually dangerous persons. Those questions are: whether the federal government has the constitutional authority to seek the indefinite commitment of a person to prevent criminal conduct that is almost exclusively proscribed by the States, without requiring a nexus between the commitment and an identifiable federal interest; and whether a statute requiring a factual finding of criminal conduct as a prerequisite to indefinite commitment may permit such commitment where that conduct is not proven beyond a reasonable doubt. Having carefully considered the arguments by all parties, the court concludes, for the reasons that follow, that the civil commitment provision of the Walsh Act is not a necessary and proper exercise of Congressional authority and that the use of a clear and convincing burden of proof violates the substantive due process rights of those subject to commitment under the statute.

Procedural History

Regarding the first filed of these cases, Graydon Comstock pled guilty on 4 October 2000 to one count of "Receipt [by computer] of materials depicting a minor engaging in sexually explicit conduct" in violation of 18 U.S.C. § 2252(a)(2), and to one count of forfeiture. He was sentenced to a 37-month prison term to be followed by a three-year period of supervised release. His term of imprisonment expired on 8 November 2006. Comstock is being held in prison, however, pursuant to the government's certification of Comstock as a "sexually dangerous person" on 2 November 2006, under the civil commitment provision of the Walsh Act, 18 U.S.C. § 4248. Comstock's release has been stayed pursuant to § 4248 for the duration of these proceedings, and he remains confined at FCI-Butner.[2]

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[1] The approximately 59 pages of new laws and amendments to existing laws that comprise the Walsh Act, Pub. L. No. 109-248, are codified in numerous scattered sections of 18 U.S.C. and 42 U.S.C.

In each of these cases, the Federal Public Defender on behalf of the respondents has filed motions to dismiss the petitions for hearings.[3] Respondents filed a motion to dismiss the petition pertaining to Comstock on 15 February 2007 and a second motion to dismiss on 20

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[2] Respondent Shane Catron, found incompetent to stand trial for aggravated sexual abuse of a minor and abusive sexual conduct under 18 U.S.C. § 4241, is currently confined at FMC-Butner. See Ca No. 5:06-HC-2202. Respondent Thomas Matherly was sentenced to a 41-month term to be followed by a three-year period of supervised release based on his guilty plea to one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(5)(B) and (b)(2). Matherly's term of imprisonment expired on 23 November 2006, and he is currently confined at FCI-Butner as a result of certification under 18 U.S.C. § 4248. See Ca No. 5:06-HC-2205. Respondent Markis Revland was sentenced to a 60-month term of imprisonment to be followed by a three-year period of supervised release based on his plea of guilty to one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(5)(B). He is currently confined at FCI-Butner. See Ca No. 5:06-HC-2212. Respondent Marvin Vigil was sentenced to a 96-month term of imprisonment to be followed by a three-year period of supervised release based on a plea of guilty to one count of sexual abuse of a minor in violation of §§ 2242(a) and 2246. He is currently confined at FCI-Butner. See Ca No. 5:06-HC-2206.

[3] While these cases have not been consolidated, substantially identical motions have been filed in each, and each motion raises questions as to the constitutionality of 18 U.S.C. § 4248. The court will address these motions together.

March 2007. The government filed a consolidated response to these motions on 5 April 2007, and respondents filed a reply on 13 April 2007. This court heard oral argument on 7 May 2007.

18 U.S.C. § 4248

Section 4248, entitled "Civil Commitment of Sexually Dangerous Persons," allows the federal government to initiate commitment proceedings with respect to federal prisoners whose sentences are about to expire, persons committed to the custody of the Attorney General under § 4241(d) based on incompetence to stand trial, and persons against whom all criminal charges have been dismissed solely for reasons relating to their mental condition, and, pursuant to court order, to commit indefinitely those prisoners found to be "sexually dangerous persons." To initiate civil commitment proceedings under § 4248(a), the Bureau of Prisons (BoP) may certify any of the foregoing individuals as a "sexually dangerous person" and effectively stay the release of that individual for the duration of the § 4248 proceedings. A certified individual is entitled to a hearing, and if the court finds "by clear and convincing evidence that the person is a sexually dangerous person," the court must commit the individual to the custody of the Attorney General for care and treatment until a state will assume responsibility or until "the person's condition is such that he is no longer sexually dangerous to others" or will not be sexually dangerous to others if released under an appropriate regimen of care or treatment. 18 U.S.C. § 4248(d). A committed individual has a right to request a review of his commitment every 180 days. 18 U.S.C. § 4247(h).

To civilly commit an individual as a "sexually dangerous person," the BoP must provide "clear and convincing evidence" that the person "has engaged or attempted to engage in sexually violent conduct or child molestation *and* . . . is sexually dangerous to others" as defined by 18 U.S.C. § 4247(a)(6). 18 U.S.C. § 4247(a)(5) (emphasis added). A person is sexually dangerous to others if the "person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. § 4247(a)(6). The statute does not define the terms "sexually violent conduct" or "child molestation."

Discussion

The Supreme Court has upheld against constitutional challenge at least one sexually violent predator act passed by a state legislature, *see Kansas v. Hendricks,* 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997), and *Kansas v. Crane,* 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002), and numerous states have sexually violent predator acts similar to the one adopted in Kansas. The government argues that § 4248 was carefully drafted with this Supreme Court precedent in mind. (Gov't Br. at 15.) Respondents argue that the broadly applicable commitment scheme outlined in § 4248 differs substantially from the carefully drawn, narrowly applicable scheme addressed in *Hendricks* and *Crane* and that § 4248 is unconstitutional for the following reasons:

1) a commitment under § 4248 is a criminal proceeding and thus violates the double jeopardy clause, the ex post facto clause, the 8th Amendment prohibition against cruel and unusual punishment, and the 6th Amendment right to jury trial;

2) Congress exceeded its power under the Commerce Clause in enacting § 4248;

3) application of the clear and convincing standard of proof in a § 4248 hearing violates due process; and

4) § 4248 violates substantive due process and equal protection under the 5th Amendment.

The court notes, as an initial matter, that respondents' arguments concerning the purported lack of Congressional authority to enact § 4248 and the use of the clear and convincing burden constitute cognizable facial challenges to the constitutionality of § 4248. The government argues that facial challenges are disfavored and inappropriate. (Gov't Br. at 6.) "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). *See also Sabri v. United States*, 541 U.S. 600, 609, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004). Section 4248's commitment scheme applies to at least three categories of individuals: prisoners whose sentences are about to expire at the time of certification, such as Comstock, Matherly, Vigil, and Revland; individuals who were committed to federal custody pursuant to § 4241 based on incompetence to stand trial, such as Catron; and individuals against whom all criminal charges have been dropped as a result of their mental condition. By advancing a facial challenge to the *entire* commitment scheme of § 4248, the government argues, respondents have violated the traditional rule that "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 767, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)). *See also Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32, 38, 120 S. Ct. 483, 145 L. Ed. 2d 451(1999).

If Congress lacked the authority to enact the civil commitment scheme at issue, however, the commitment scheme could not be constitutionally applied. Even if Congress does theoretically have the authority to provide for the civil commitment of sexually dangerous persons in federal custody, § 4248 could not be constitutionally applied to any person if it is not a "necessary and proper" means of achieving that ostensibly legitimate end. Likewise, because § 4248's explicitly requires the application of the clear and convincing standard of proof to determine the permissibility of commitment, the statute cannot be applied constitutionally to anyone if the application of that standard violates due process.

I. Civil vs. Criminal Nature of Section 4248

Respondents argue that the commitment scheme set up by § 4248 operates as a form of preventive detention and, as such, constitutes a criminal proceeding. (FPD Br. at 23.) Supreme Court precedent pertaining to commitment generally and to commitment of sexually dangerous individuals pursuant to state laws specifically dictates that § 4248 be characterized as a civil scheme.

In *Kansas v. Hendricks*, the Supreme Court reviewed a challenge to the constitutionality of the Kansas Sexually Violent Predator Act (KSVPA) and held, among other things, that the KSVPA's commitment scheme did not establish criminal proceedings and that involuntary confinement pursuant to that statute was not punitive. 521 U.S. at 361-63, 117 S. Ct. 2072. In so holding, the Court reviewed: the Kansas legislature's intent; whether primary purposes of the KSVPA were retribution or deterrence; the restriction of the freedom of mentally ill persons as a legitimate, nonpunitive government objective; the potentially indefinite nature of the confinement permitted by the statute; the state's use of various procedural safeguards; and the availability of treatment for individuals committed. *Id.* at 361-69, 117 S. Ct. 2072.

Section 4248 is not sufficiently distinguishable from the KSVPA for purposes of the civil/criminal analysis to justify a different result in this case. Congress clearly expressed its intent that § 4248 be a civil commitment proceeding, *see* 18 U.S.C. § 4248 ("Civil Commitment of a sexually dangerous person"),[4] and the apparent goal of the statute is to protect the community from sexually violent predators. As in *Hendricks*, 521 U.S. at 363, 117 S. Ct. 2072, the purpose of the Walsh Act's federal commitment provision would not be considered retributive because it does not affix culpability for prior criminal conduct and no finding of scienter is required for commitment. Because the statute is explicitly aimed at confining people who have been found to have serious difficulty controlling their conduct, it cannot be said that the statute serves a deterrent purpose. As Justice Scalia wrote in his dissent in *Crane*, 534 U.S. at 420, 122 S. Ct.

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[4] The commitment provision of the Walsh Act is codified in Chapter 313 of Title 18 of the United States Code alongside other federal civil provisions.

867, "[o]rdinary recidivists *choose* to reoffend and are therefore amenable to deterrence through the criminal law; those subject to civil commitment under [the KSVPA] because their mental illness is an affliction and not a choice, are unlikely to be deterred." *See also Hendricks*, 521 U.S. at 362-63, 117 S. Ct. 2072; *Allen v. Illinois*, 478 U.S. 364, 373-74, 106 S. Ct. 2988, 92 L. Ed. 2d 296 (1986) (commitment proceedings under the Illinois Sexually Dangerous Persons Act, designated civil by the Illinois legislature, were not criminal within the meaning of the self-incrimination clause of the Fifth Amendment); *In re Young*, 122 Wash. 2d 1, 857 P.2d 989, 996-99 (1993) (holding similar Washington statute to be civil) (superseded by statute on other grounds).

Several recent decisions addressing constitutional challenges to the Sex Offender Registration and Notification Act (SORNA), which is Title I of the Walsh Act, 42 U.S.C. §§ 16901 *et seq.*, have concluded that the SORNA is civil and nonpunitive. *See United States v. Mason*, No. 6:07-cr-52-Orl-19Jgg, 2007 WL 1521515, 510 F. Supp. 2d 923 (M.D. Fla. May 22, 2007); *United States v. Hinen*, 487 F. Supp. 2d 747, 757 (W.D. Va. 2007); *United States v. Templeton*, No. CR-06-291-M, 2007 WL 445481 (W.D. Okla. Feb. 7, 2007); *United States v. Madera*, 474 F. Supp. 2d 1257 (M.D. Fla. 2007) (relying on *Smith v. Doe*, 538 U.S. 84, 96, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), and *Hendricks* for proposition that the Walsh "Act (and SORNA within it) is a 'civil, nonpunitive' law").

Because analogous case law indicates that § 4248 is properly construed as a civil scheme, respondent's double jeopardy, ex post facto, cruel and unusual punishment, and jury trial claims, cognizable only in the criminal or punitive context, do not require the dismissal of the government's petitions for hearing in these cases.

II. The Federal Government's Authority to Civilly Commit Sexually Dangerous Persons: The Necessary and Proper Clause

Statutes are presumed constitutional. *United States v. Morrison*, 529 U.S. 598, 607, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000). "Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *Id.* As the *Morrison* Court explained, "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. 'The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.' *Marbury v. Madison*, 1 Cranch 137, 176, 2 L. Ed. 60 (1803)." *Morrison*, 529 U.S. at 607, 120 S. Ct. 1740.

Congress did not explicitly identify the source of federal authority on which it relied in enacting the civil commitment provision of the Walsh Act. Respondents argue that § 4248 exceeds Congressional authority under the Commerce Clause. In its brief, the government does not rely on the Commerce Clause, but rather contends that the court need not reach the Commerce Clause issue to decide the case,[5] arguing that Congress had the authority to enact § 4248 pursuant to the Necessary and Proper Clause, U.S. Const., Art. I, § 8, cl. 18. Specifically, the government argues that Congress's power to prevent the commission of certain crimes by persons in the custody of the BoP flows from Congress's power to criminalize that conduct in the first place, to prosecute those crimes, and to regulate the persons who legitimately enter the custody of the BoP as a result of such criminal prosecutions. (Gov't Br, at 7.) The government argues that civil commitment under § 4248 is thus a permissible expression of its regulatory power to prevent criminal conduct.

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[5] At oral argument, however, the government contended that civil commitment under § 4248 is necessary and proper to both its authority to prosecute federal crimes and its Commerce Clause powers, to the extent it has criminalized conduct pursuant to those powers, (Trans. at 25). Accordingly, the court will consider whether the Commerce Clause provides the requisite authority.

The parties' respective arguments regarding the federal government's authority to civilly commit sexually dangerous individuals in the manner prescribed by § 4248 pose significant questions as to the appropriate interpretation and application of the Necessary and Proper Clause. That clause provides Congress with the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution [its enumerated] powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Accordingly, a Congressional enactment must meet three criteria to be valid under the Necessary and Proper Clause: it must be 1) necessary, and 2) proper, to 3) the exercise of a power vested in the government by the Constitution. As Justice Marshall wrote in *M'Culloch v. Maryland*, 4 Wheat. 316, 17 U.S. 316, 421, 4 L. Ed. 579 (1819), regarding the scope of the Clause, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Because the government has invoked the Necessary and Proper Clause, the court must examine carefully the enumerated and incidental powers upon which the government relies as a source of federal authority to enact § 4248. In addition, even assuming § 4248 is tied to the exercise of an identifiable constitutional power, the court must determine whether § 4248 is a necessary and proper means of effectuating that power. *See generally*, Gary Lawson and Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 285 (Nov. 1993) (detailing textual and structural arguments that "proper," as used in the Sweeping Clause, is a term distinct from and supplementary to, "necessary," and that it functions as an integral part of the constitutional design for a limited national government, i.e., as a substantive, jurisdictional limitation on Congressional power).

A. Analysis of Congressional Authority

Of the powers suggested by the government, the Commerce Clause is the only one that is actually enumerated in the Constitution. U.S. Const., Art. 8. The other powers cited by the government—such as the power to criminalize and punish certain conduct, and the power to prosecute—are certainly recognized government powers; however, those powers are themselves necessary and proper exercises of power premised upon enumerated powers. Congress's power to criminalize certain conduct is necessarily defined and circumscribed by the enumerated powers, such as the Commerce Clause, or the Spending Clause. The power to prosecute crimes is, of course, an incidental power bounded by the limited power to criminalize. And, the power to regulate those legitimately in federal custody is bounded by the individual rights of the persons in custody as described by the Constitution and by the limitations on the powers from which that power to regulate derives. Moreover, as the government acknowledged at oral argument, (Trans. at 26), Congressional power under the Necessary and Proper Clause is, itself, "limited and capped by other constitutional prescriptions . . . [f]or instance, the Tenth Amendment," (*id.* at 26), and the substantive due process rights of individuals, (*id.* at 27). The language of the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people," U.S. Const., Amend. X, raises important concerns regarding "appropriate means" and the "letter and spirit of the Constitution" when this court is faced with federal legislation in an area that is both not explicitly delegated to the United States and traditionally governed by the several states in an appropriate exercise of their police and *parens patriae* powers. Accordingly, the court turns to an examination of the powers upon which § 4248 is arguably premised.

1. The Power to Prosecute

One of the categories of individuals subject to commitment under § 4248 is comprised of individuals who have previously been committed to the custody of the Attorney General pursuant to section § 4241(d), which allows the temporary commitment of individuals suffering from a mental disease or defect that renders them mentally incompetent to stand trial.[6] The government offers *Greenwood v. United States*, 350 U.S. 366, 76

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[6] Respondent Catron is one such individual.

S. Ct. 410, 100 L. Ed. 412 (1956), in support of its position that the federal government may legislate to maintain custody over individuals where the federal government has an unexhausted power to prosecute, (Trans. at 39), as in the case of an individual subject to commitment under § 4248 by way of previous commitment under § 4241(d) based on incompetence to stand trial.

In *Greenwood*, the Supreme Court upheld Congress's power to civilly commit an incompetent individual pursuant to 18 U.S.C. § 4246 and § 4248. At that time, § 4246 permitted the temporary, pre-trial commitment of an individual found incompetent to stand trial, and § 4248 permitted the further commitment of the same individual "until the sanity or mental competency of the person shall be restored or until the mental condition of the person is so improved that if he be released *he will not endanger the safety of the officers, the property, or other interests of the United States*, or until suitable arrangements have been made for the custody and care of the prisoner by the State of his residence, whichever event shall first occur." *Greenwood*, 350 U.S. at 369 n.4 & 374, 76 S. Ct. 410 (emphasis added).

While Justice Frankfurter rejected the federalism challenge mounted in *Greenwood*, he explicitly defined the limited extent of federal power to deal with civil commitment of incompetent and dangerous individuals. He wrote that where the petitioner at issue came legally into the custody of the United States but was found unable to stand trial because of his mental condition, "*the power that put him into such custody—the power to prosecute for federal offenses—is not exhausted.* Its assertion in the form of the pending indictment persists. . . . [Such a] commitment, and therefore the legislation authorizing commitment in the context of this case, involve an assertion of authority, duly guarded, auxiliary to incontestable national power. As such it is plainly within congressional power under the Necessary and Proper Clause, Art. I, 8, cl. 18." *Id.* at 375, 76 S. Ct. 410 (emphasis added).

Accordingly, in *Greenwood,* the Supreme Court recognized that civil commitment of a mentally ill and dangerous individual who is subject to a pending indictment but who is found to be incompetent to stand trial is a legitimate exercise of Congressional power and that the statutory provision for such commitment was necessary and proper to the government's power to prosecute. Thus, to the extent that there is an indictment pending against an individual like Catron, the power to prosecute is not exhausted, and the Supreme Court has held that Congress has the power to authorize civil commitment where release would endanger the interests of the United States.[7] The civil commitment provision considered by the *Greenwood* Court, however, differs markedly from § 4246 and § 4248 as they exist today. Accordingly, *Greenwood* is not dispositive of the issue of Congressional power in the context of § 4248 cases as the government contends.

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[7] The limited holding of *Greenwood* may be characterized as one farther limited by narrow statutory language requiring a potential harm to the "interests of the United States" to justify federal commitment. While that statutory language has been changed to permit commitment if a person's release would "create a substantial risk of bodily injury to another person or serious damage to property of another," the court has not located any case law actually addressing a challenge to Congress's authority to enact such a civil commitment scheme designed to commit, among others, prisoners whose sentences are about to expire and with respect to whom the power to prosecute has arguably been exhausted simply to prevent generalized, nonspecific harm to the public.

Importantly, *Greenwood* did not address the source of Congressional authority to civilly commit a prisoner whose sentence is about to expire, such as respondents Comstock, Matherly, Vigil and Revland,[8] persons as to whom the power to prosecute is, in fact, exhausted. With respect to such individuals, an attempted commitment under § 4248 is a governmental attempt to control the conduct and circumstances of individuals who are in federal custody after "the power to prosecute for federal offenses" has been exhausted and after the sentences of imprisonment have been served. Likewise, if all criminal charges against an individual have been dropped for reasons pertaining to his mental condition, any further government action against that individual could not be supported by the power to prosecute. The *Greenwood* Court explicitly declined to provide guidance as to whether such an exercise of power is permissible. 350 U.S. at 376, 76 S. Ct. 410 ("We decide no more than the situation before us presents and equally do not imply an opinion on situations not now before us.").

The government makes some effort to bring the commitment of a prisoner whose sentence is about to expire within the ambit of Congress's power to prosecute, offering *United States v. Plotts*, 347 F.3d 873 (10th Cir. 2003), as an example of a case in which a court has held that Congress has the "necessary and proper authority to help and assist the executive in its prosecutorial functions," (Trans, at 25-26).[9]

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[8] In fact, respondents Comstock's and Matherly's sentences have already expired, and both inmates remain in federal custody solely as the result of the statute challenged here.

In *Plotts*, the defendant pled guilty to receiving child pornography over the Internet and to a count of criminal forfeiture, and he was ultimately required, as a condition of supervised release, to cooperate in the collection of his DNA during that period of supervised release. The defendant argued, in reliance on *United States v. Lopez*, 514 U.S. 549, 561, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), and *Morrison*, that Congress exceeded its power under the Commerce Clause in enacting the DNA Act, 18 U.S.C. § 3583(d). The Tenth Circuit approved a DNA collection scheme applicable to an individual as a condition of his supervised release, concluding that the DNA Act was a valid exercise of Congressional power under the Necessary and Proper Clause. *Plotts*, 347 F.3d at 877. The court concluded that, if the DNA Act were construed as a civil sanction for certain criminal conduct, the Act would be "necessary and proper to the exercise of the Commerce Clause." *Id.* at 879. If, on the other hand, the Act were construed as a law enforcement tool, the "Act is a law necessary and proper to the Executive's constitutionally delegated law enforcement powers." *Id.* at 879. In this context, the court found that the defendant had pled guilty to a crime that was a valid exercise of the Commerce Clause power, and that the

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[9] It would appear somewhat contradictory to support the constitutional authority to propagate a "civil" commitment scheme by reference to a power to prosecute "criminal" conduct. As the government itself has argued, § 4248 serves a regulatory or civil function and, in that sense, when applied to preventively detain individuals who have been sentenced and who have served time for criminal offenses, could not be accurately described as a necessary and proper aid to the "prosecution" of criminal conduct.

Necessary and Proper Clause "entrusts Congress with the power to pass laws to aid the Executive in prosecuting those who, like Mr. Plotts, violate federal criminal laws." *Id.* The federal government's right to prosecute and punish, the court found, would be severely hampered "without investigative techniques like the DNA Act." *Id.* at 880. The court illustrated the rational link between the provisions of the DNA Act and the *enforcement* of a valid federal criminal law, explaining that the DNA samples collected from persons convicted of federal crimes were organized into a national database enabling federal, state and local crime labs to exchange and compare information and to link crimes to each other and to convicted offenders.

Unlike the DNA Act, § 4248 is not an investigative tool and it does not aid in the prosecution or enforcement of federal criminal laws. Rather, it provides indefinite detention or commitment of persons who have not necessarily been convicted of sexually violent crimes or child molestation to prevent the future commission of sexually violent acts and child molestation. Moreover, the DNA Act regulates the federal government's interaction with persons in federal custody during the terms of their sentences. It does not attempt to regulate the behavior or constrain the liberty of individuals after the expiration of the sentences they served for their criminal convictions as § 4248 does.

The court concludes that civil commitment of sexually dangerous persons whose prison sentences are about to expire is not a necessary and proper extension of Congress's power to prosecute federal crimes. Another source of power must support the use of the necessary and proper authority in this context.

2. The Commerce Clause Power

Like prohibiting the possession of guns within a school zone, 18 U.S.C. § 922(q)(1)(A), or creating a federal civil remedy for the victims of gender-motivated crimes of violence, 42 U.S.C. § 13981, ensuring that pedophiles and other sexually dangerous persons are not permitted to prey on women and children in our communities is a laudable goal. Whether the federal government has the power under the Commerce Clause or, by extension, the Necessary and Proper Clause, to accomplish that end is another matter entirely.

Lopez and *Morrison* suggest that § 4248 would be found unconstitutional if it were premised solely upon Congress's Commerce Clause authority. Like the Gun Free School Zones Act at issue in *Lopez* and section 13981 of the Violence Against Women Act of 1994, which was considered in *Morrison*, § 4248 "contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce." *Morrison*, 529 U.S. at 613, 120 S. Ct. 1740. Cf., *United States v. Templeton*, No. CR-06-291-M, 2007 WL 445481 (W.D. Okla. Feb. 7, 2007) (holding that the federal failure to register as a sex offender statute, 18 U.S.C. § 2250(a)(2)(B), a part of the Walsh Act, does not violate the Commerce Clause because the statute includes a jurisdictional nexus as it applies only to those who have been convicted of sex offenses and who travel in interstate or foreign commerce and thus specifically involves persons in interstate travel, an appropriate subject of Congress's Commerce Clause power); *Hinen*, 487 F. Supp. 2d at 757-58 (same); *Mason*, 2007 WL 1521515, at *7, 510 F. Supp. 2d at 932 (same). Indeed, at oral argument, the government acknowledged that § 4248 does not contain a jurisdictional element providing a Commerce Clause nexus. (Trans. at 23.)

In addition, § 4248 is not an example of legislation "regulating activity substantially affecting interstate commerce," *Morrison*, 529 U.S. at 610, 120 S. Ct. 1740, nor does it appear to be a necessary part of a more general regulation of interstate commerce, *see Gonzales v. Raich*, 545 U.S. 1, 37, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005) (Scalia, J., concurring). Rejecting the argument that Congress could "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce," the Supreme Court in *Morrison* preserved "one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *Morrison*, 529 U.S. at 617-18, 120 S. Ct. 1740. Even if § 4248 cannot accurately be described as a punishment, it is most certainly an attempted regulation of violence that is not directed at interstate commerce.

Lopez and *Morrison* invalidated laws for lack of adequate connection to the federal regulation of commerce. In *Lopez*, the Court struck down a criminal prohibition, and in *Morrison*, the Court struck down a federal civil remedy for criminal conduct. Both statutes were Congressional attempts to regulate noneconomic activity. And in both, the Supreme Court rejected the "pil[ing] of inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States," *Lopez*, 514 U.S. at 567, 115 S. Ct. 1624. *See* also *id.* at 577, 115 S. Ct. 1624 (Kennedy, J., concurring) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur"). The restrictiveness of the Supreme Court's analyses in *Lopez* and *Morrison* of the Commerce Clause, an actual enumerated power, is no less applicable and perhaps more so, in the context of the Necessary and Proper Clause, a provision that, by definition, permits action merely incidental to an enumerated power. *See Raich*, 545 U.S. at 65, 125 S. Ct. 2195 (Thomas, J., dissenting) (just as allowing Congress to regulate intrastate, noncommercial activity under the Commerce Clause would confer on Congress a general police power over the Nation, "[t]his is no less the case if Congress ties its power to the Necessary and Proper Clause"). In the context of the Necessary and Proper Clause, even more than in the *Lopez* and *Morrison* Commerce Clause scenarios, the danger of allowing the federal government to expand the scope of its powers by way of inference and attenuation and to encroach upon the authority and power traditionally reserved to the states is significant. *See Morrison*, 529 U.S. at 608, 120 S. Ct. 1740 ("The scope of the interstate commerce power must be considered in light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.").

3. The Power to Prevent Criminal Conduct

The government argues that Congress's power to commit sexually dangerous individuals derives from its power to prevent the commission of criminal conduct, which in turn, derives from its power to criminalize that conduct in the first place, which power derives from powers enumerated by the Constitution, such as the Commerce Clause. (Gov't Br. at 7-9.) Citing *United States v. Perry*, 788 F.2d 100 (3rd Cir.), cert. denied, 479 U.S. 864, 107 S. Ct. 218, 93 L. Ed. 2d 146 (1986), the government argues that "[w]here the Constitution invests Congress with the power to criminalize, it invests Congress with the power to prevent the commission of those crimes by persons in BoP or Attorney General custody where 'necessary and proper' to its authority to regulate persons in its custody and to criminalize the conduct." (Gov't Br. at 7; *see also* Trans. at 21-22, 25 (when Congress has the authority to criminalize conduct under the Commerce Clause, Congress also has the necessary and proper authority to prevent the future commission of those federal crimes).)[10] A careful examination of *Perry*, however, illuminates the narrowness and specificity of its relevant holding.

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[10] In support of its argument that Congress has the power to provide for civil commitment of sexually dangerous persons, the government also cites *Plotts*, 347 F.3d at 878, as well as *United States v. Blumberg*, 136 F. Supp. 269, 271 (E.D. Pa. 1955); *Ponzi v. Fessenden*, 258 U.S. 254, 262-63, 42 S. Ct. 309, 66 L. Ed. 607 (1922); and *United States v. Berrigan*, 482 F.2d 171, 182 (3rd Cir. 1973), as examples of cases in which courts have "routinely upheld legislation aimed at preventing federal crimes by persons in federal custody and as preemptive means to aid in Congress's authority to criminalize conduct." (Gov't Br. at 9.) First, § 4248 is not a law aimed at preventing federal crimes by persons in federal custody; it is a *law* designed to prevent the commission of sexually violent conduct and child molestation generally, and it is designed to continue the confinement of certain individuals so they cannot commit crimes when released from federal custody. All of the foregoing cases

In *Perry*, the Third Circuit addressed the constitutionality of a presumption contained in the Bail Reform Act permitting pretrial detention of an arrestee when "no condition or combination of conditions will reasonably assure . . . the safety of the community" and where there is probable cause to believe that the accused has committed a major drug trafficking offense or a felony with a firearm. The court examined the source of federal power to detain arrestees without conviction (a type of civil commitment) for the safety of the community. *Perry*, 788 F.2d at 109.

> What, then, is the source of congressional authority to provide for civil commitment for "the safety of the community"? As the legislative voice of a government of limited powers, Congress, unlike the legislatures of the states, cannot sanction for the general welfare . . . Congress may concern itself with the "safety of the community" only to the extent that other grants of specific power so permit.

Id.

In its analysis, the *Perry* court drew from the Supreme Court's *Greenwood* decision the principle that "the federal government may resort to civil commitment

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cited by the government, in contrast, pertain to the control or regulation of individuals who are in one stage or another of federal custody as a result of a criminal charge or conviction. Second, as noted before, § 4248 is not a preemptive means to aid in Congress's authority to criminalize conduct because § 4248 is, according to the government, not a criminal law, and it does not criminalize conduct. The cases cited by the government are distinguishable.

when such commitment is necessary and proper to the exercise of *some specific federal authority*. Congress may not, however, authorize commitment simply to protect the general welfare of the community at large." *Id.* at 110 (italics added).[11] The specific federal authority at issue in *Greenwood* was the "power to prosecute for federal offenses." *Greenwood*, 350 U.S. at 375, 76 S. Ct. 410. Recognizing that the federal interest at issue in *Greenwood* was not present in *Perry*, the *Perry* court examined the source of Congressional authority to provide for civil commitment for "the safety of the community." *Perry*, 788 F.2d at 110. Applying the *Greenwood* principle, the *Perry* court wrote:

> A reasonable construction of this provision is that it is aimed at preventing the specific harm to the community proscribed by the four designated statutes; three dealing with drugs and one dealing with the use of firearms in the commission of federal offenses.

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[11] The court recognizes that the *Perry/Greenwood* principle does call into question the source of Congressional power to enact the civil commitment provision of 18 U.S.C. § 4246 as that statute pertains to prisoners whose sentences are getting ready to expire. Because § 4246 authorizes commitment of a prisoner suffering from a mental disease or defect "as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another," the statutory language suggests an attempt to protect the general welfare of the community.

While the Supreme Court has held the commitment of incompetents who pose a danger to the interests of the United States to be within the scope of Congressional authority based on the unexhausted power to prosecute, see *Greenwood*, that analysis would not apply to the general commitment of mentally ill and dangerous prisoners whose sentences are about to expire. This court has not located a Supreme Court case specifically addressing the constitutionality of that provision. The constitutionality of § 4246, however, is not before this court.

> We, therefore, read the second presumption of section 3142(e) as addressing *only* danger to the community from the likelihood that the defendant will, if released, commit one of the proscribed federal offenses. Thus because Congress has the power to proscribe the activities in question, it has the auxiliary authority, under the necessary and proper clause, to resort to civil commitment to prevent their occurrence.

Id. at 110-11 (emphasis added).

The pre-trial detention scheme in *Perry* is distinguishable in several ways from the commitment scheme at issue in § 4248. In *Perry*, the presumption of detention was triggered *only* for those individuals charged with serious violations of one of four federal drug and firearms statutes, and the statute was construed as one specifically "aimed at preventing the specific harm to the community proscribed by the four designated statutes." *Id.* at 111. The court explicitly based its holding that the provision in question was necessary and proper to the exercise of a specific federal authority on its conclusion that the statute "address[ed] *only* danger to the community from the *likelihood that the defendant will, if released, commit one of the proscribed federal offenses.*" *Id.* (emphases added). Thus, in *Perry*, the court perceived an explicit federal interest, i.e., the prevention of specific federal crimes, and a distinct nexus between the federal crimes with which the individuals in *Perry* were charged and the presumption that those individuals would commit one of the enumerated federal crimes again if not committed.

Under § 4248, any federal prisoner is eligible for certification as a sexually dangerous person, regardless of the nature of his previous conviction, and any individual committed pursuant to § 4241(d) is eligible, regardless of the nature of the charges against him. Section 4248 is, thus, far more broadly applicable than the provision of the Bail Reform Act at issue in *Perry*. Section § [*sic*] 4248 is not aimed at preventing a specific harm to the community proscribed by a set of enumerated federal laws. Unlike the provision of the Bail Reform Act at issue in *Perry*, section 4248 simply cannot be construed as a statute addressing *only* the danger to the community from the likelihood that the defendant will, if released, commit a proscribed federal offenses. It does not require a showing or employ a presumption that a prisoner or one incompetent to stand trial will, if not committed, commit *a proscribed federal offense*, or for that matter, any federal offense.

The government acknowledged at oral argument that *Perry*'s necessary and proper holding "was tethered to the crimes for which the individual was held that would be committed in the future if the person was released. Because Congress had the Commerce Clause authority to criminalize certain federal drug offenses and federal drug crimes, the [*Perry* court] found that Congress also possesses the necessary and proper authority *to prevent the future commission of those crimes*." (Trans. at 34 (emphasis added).) Without elaborating upon the necessary leap of logic, the government argues that the fact that § 4248 "may thwart the commission *of purely* state law sex offenses *rather than federal crimes* is of no moment." (Br. at 11 (emphases added).) The government's reliance on *Perry* here is unpersuasive. While the statute at issue in *Perry* may have *also* thwarted the commission of some state law crimes, the *Perry* court specifically premised Congressional authority to enact the detention provision on the fact that the Act presumed that, absent detention, the charged individuals would commit one of several, enumerated, proscribed federal offenses.

The government concedes that § 4248 is aimed at preventing any or all of the sexually violent conduct ***underlying*** various federal sex crimes. It is precisely the purview of the states, however, to deal with the so-called "underlying conduct"—particularly if, by that language, the government means the sexually violent conduct stripped of the jurisdictional bases that typically enable Congressional criminalization and regulation. Section 4248, unlike the statute at issue in *Perry*, is a statute broadly designed to authorize commitment to protect the general welfare of the community, a power that the *Perry* court believed was not within the scope of Congressional authority.

A closer look at various federal sex offenses illuminates the disconnect between the federal government's limited authority to criminalize sexually violent conduct and § 4248's scheme permitting the certification and commitment of any federal prisoner who could be characterized as a sexually dangerous person. The federal government simply does not have broad power generally to criminalize sexually dangerous conduct and child molestation.[12]

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[12] As Justice Marshall wrote in a dissent in *Salerno*, 481 U.S. at 759 n.4, 107 S. Ct. 2095, "[p]reventing danger to the community through the enactment and enforcement of criminal laws is indeed a legitimate goal, but in our system the achievement of that goal is left primarily to the States. The Constitution does not contain an explicit delegation to the Federal Government of the power to define and administer the general criminal law."

> Since the Constitution does not delegate to Congress generally the right to enact criminal laws, every foray into the area of criminal law is an intrusion into the states' traditional dominion. However, when an activity is the source of a problem national in scope and substantially affects an area *over which Congress has power*, Congress is within its authority in determining that the balancing inherent in federalism weighs in favor of its regulating that activity. . . .
>
> A factor weighing heavily in favor of passing constitutional muster is a jurisdictional element in the criminal statute, that is, one which requires as an element of proof evidence that the activity is interstate in nature. . . .

United States v. Ganaposki, 930 F. Supp. 1076 (M.D. Pa. 1996) (citations omitted) (emphasis added) (holding section 228 of Child Support Recovery Act valid under the Commerce Clause because willful failure to pay child support with respect to a child residing in another state has a substantial effect on interstate commerce). In other words, congressional enactment of the federal criminal laws is itself an exercise of power under the Necessary and Proper Clause. *See, e.g., United States v. Patton*, 451 F.3d 615, 618 (10th Cir. 2006) ("It may seem like common sense to prohibit felons' possession of bulletproof vests and other forms of body armor, which facilitate violent crime. Indeed, thirty-one states already do so. But the Constitution does not grant the federal government a police power or a general authority to combat violent crime. . . . The myriad provisions in the federal criminal code are justified, as a constitutional matter, only by reference to Congress's enumerated powers."), cert. denied, — U.S. —, 127 S. Ct. 1247, 167 L. Ed. 2d 87 (2007). Providing for civil commitment deemed necessary to effectuate the goals of federal criminal laws, which are themselves contingent on some other enumerated power, may be permissible, but the connections should be made clear.[13]

Federal sex crimes have, incorporated within them, specific jurisdictional elements. *See, e.g.*, 18 U.S.C. §§ 2241-2245, 2251-2252 (addressing proscribed sexual conduct with children or others, or conduct exploitative of children, that occurs in the maritime or territorial jurisdiction of the United States, in federal prisons, or in interstate commerce). The power to criminalize certain circumscribed sexually violent behavior is not an "enumerated power" upon which to premise the civil commitment of any potentially sexually dangerous persons as a "necessary and proper" act. Construing the necessary and proper clause in this way would allow Congress to take steps to "prevent" all kinds of conduct that it has no ability to criminalize in the first place.

If Congress is limited in criminalizing conduct and punishing that conduct when it occurs, Congress must be subject to those same limitations in any quest to prevent such criminal conduct from happening. The government is correct that incidental prevention of criminal conduct that violates state laws should not, in and of itself, invalidate a federal effort to prevent the commission of federal crimes. However, where there is absolutely no nexus between the findings required for commitment under § 4248 and the likelihood that any individual prisoner would commit a federal sex crime, and where the vast majority of sexually violent conduct and child sexual abuse is regulated by state law, and where the commitment of mentally disordered sexually violent individuals is traditionally handled by state governments, the federal government has created a situation in which its commitment efforts are likely to solely prevent the commission of state criminal conduct.

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[13] For example, "[t]he Supreme Court has . . . recognized that the Necessary and Proper Clause contained in Article I, § 8, ¶ 18 extends the reach of the Spending Clause to authorize federal criminal laws which 'keep a watchful eye on expenditures and on the reliability of those who use public money.' See *Sabri v. United States*, 541 U.S. 600, 124 S. Ct. 1941, 158 L. Ed. 2d 891 . . . (2004)." *Daker v. Ferrero*, 475 F. Supp. 2d 1325, 1342 n.9 (N.D. Ga. 2007).

The court concludes that neither the Commerce Clause, the Necessary and Proper Clause, nor any other authority suggested, provide Congress with the power to enact § 4248 as it pertains to individuals previously committed under § 4241, to prisoners whose sentences are about to expire, or to people in federal custody against whom all criminal charges are dropped based on mental condition.

B. Is § 4248 "Necessary" and "Proper"?

Assuming, for the sake of argument, that Congress had the power to enact § 4248, the court will examine whether § 4248 is a necessary and proper exercise of that power.

1. Necessary

The Supreme Court has held on several occasions that the Necessary and Proper Clause does not demand that an act of Congress be "absolutely necessary" to the exercise of an enumerated power. *See, e.g.*, *Jinks v. Richland County, S.C.*, 538 U.S. 456, 462, 123 S. Ct. 1667, 155 L. Ed. 2d 631 (2003). The Necessary and Proper Clause "enables Congress to enact laws, subject to other constitutional constraints, 'that bear a rational connection to any of its enumerated powers.'" *Plotts*, 347 F.3d at 878.

Even if *Perry* stands for the proposition that the federal government has the power or the authority under the Necessary and Proper Clause to detain or commit individuals in an attempt to prevent the conduct that it has the power to criminalize, a proposition that respondents dispute, § 4248 should not be characterized as a "necessary" means of carrying out that particular power because the statute is not, as explained above, rationally connected to the goal of preventing *federal* sex crimes. Finding that a person has engaged in the statutorily undefined "sexually violent conduct" or "child molestation" and that a person has a mental abnormality inclining him or her to sexual deviance or violence of one kind or another is simply not a reliable indication of the likelihood that (s)he will commit a *federal* crime, i.e., a type of criminal conduct that the federal government has the authority to regulate, and thus commitment of such a person cannot accurately be described as an action necessary to the execution of an enumerated federal power.

The court recognizes that the broad interpretation accorded to the term "necessary" historically gives Congress wide latitude in crafting federal laws to help carry out its enumerated powers. The "necessary" test simply is not a strenuous one. Necessary and proper are not synonymous, however.

2. "Proper" Laws—a Limitation of the Federal Government's License to Regulate

In *M'Culloch,* Justice Marshall emphasized that Congress could not "under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government." 17 U.S. at 423. The Supreme Court reiterated the limitations imposed by the Constitution upon the federal government in *Morrison*:

> With its careful enumeration of federal powers and explicit statement that all powers not granted to the federal government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate . . . Moreover, the principle that "'the Constitution created a Federal Government of limited powers,'" while reserving a generalized police power to the States, is deeply ingrained in our constitutional history.

Morrison, 529 U.S. at 618 n.8, 120 S. Ct. 1740 (citations omitted). Justice Marshall's oft-quoted language from *M'Culloch* also requires any act taken pursuant to the Necessary and Proper Clause to be accomplished by means "which are appropriate," and which "consist with the letter and spirit of the constitution, ..." *Id.* Both requirements may allude to propriety.

"[A] 'proper' executory law must respect the system of enumerated federal powers: executory laws may not regulate or prohibit activities that fall outside the subject areas specifically enumerated in the Constitution." *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause,* 43 Duke L.J. at 285. Both *M'Culloch* and the rationale underlying the

Supreme Court's more recent Commerce Clause jurisprudence support the thesis offered by Lawson and Granger that the term "proper," as used in the Necessary and Proper Clause, functions as a substantive, jurisdictional limitation on Congressional power. Given the requirement that means chosen by Congress be "appropriate" and "consist[ent] with the letter and spirit of the Constitution" and taking into consideration both the carefully delimited powers of the federal government and the powers traditionally reserved to and exercised by the States, this court concludes that § 4248 is not a "proper" exercise of federal power.

The Fourth Circuit has recognized that Congress may act pursuant to an enumerated or cognizable incidental power, yet still fail to craft a statute that is a proper means of effectuating its intent:

> Under the Supreme Court's interpretation of the [Tenth] amendment, we ask two questions to determine whether a statute violates it: First, whether the regulation it embodies is within Congress' raw power as being within those enumerated in the constitution. Second, whether, even if so, the means of regulation employed yet impermissibly infringe upon state sovereignty. *New York v. United States*, 505 U.S. 144, 159, 188, 112 S. Ct. 2408, 120 L. Ed. 2d 120, . . . (1992) (so concluding, in process of holding that while Congress had raw Commerce Clause power to regulate disposal of low level nuclear waste, means chosen, of effectively requiring states to regulate, impermissibly infringe on state sovereignty). *See also ACORN v. Edwards*, 81 F.3d 1387, 1393 (5th Cir. 1996) (same).

United States v. Johnson, 114 F.3d 476, 480 (4th Cir.), cert. denied, 522 U.S. 904, 118 S. Ct. 258, 139 L. Ed. 2d 185 (1997).

The Tenth Amendment provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively. . . ." U.S. Const., Amend. X. The interpretation and application of the Necessary and Proper Clause must accord with the letter and spirit of the Tenth Amendment and the historical reservation of certain defined powers to the states. In this case, the government has asserted Congress's power to act pursuant to the Necessary and Proper Clause in two overlapping areas traditionally governed by the states—the prohibition of sexually violent criminal conduct and the commitment of and care for mentally ill individuals. *See Raich,* 545 U.S. at 42, 125 S. Ct. 2195 ("The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens.") (O'Connor, J., dissenting); *Morrison,* 529 U.S. at 618, 120 S. Ct. 1740 ("we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime"); *O'Connor v. Donaldson,* 422 U.S. 563, 582-83, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975) ("There can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease. . . . Additionally, the States are vested with the historic *parens patriae* power, including the duty to protect 'persons under legal disabilities to act for themselves.' . . . . The classic example of this role is when a State undertakes to act as 'the general guardian of all infants, idiots, and lunatics.'" (citations omitted)); *United States v. Cohen*, 733 F.2d 128, 133 (D.C. Cir. 1984) (same); *United States v. Duhon*, 104 F. Supp. 2d 663, 681 (W.D. La. 2000) (care and treatment of mentally ill and incompetent has historically been the province of the states).[14] This assertion of power, together with the government's acknowledgment at oral argument that the Tenth Amendment limits the necessary and proper power of Congress, (Trans. at 26), highlight the difficulties posed by § 4248's commitment scheme.[15]

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[14] That the government created by the Federal Constitution is one of enumerated powers, and cannot, by any of its agencies, exercise an authority not granted by that instrument, either in express words or by necessary implication; that . . . a state of the Union may exercise all such governmental authority as is consistent with its own Constitution, and not in conflict with the Federal Constitution; that such a power in the state, generally referred to as its police power, is not granted by or derived from the Federal Constitution, but exists independently of it, by reason of its never having been surrendered by the state to the general government; that among the powers of the state, not surrendered, which power therefore remains with the state, is the power to so regulate the relative rights and duties of all within its jurisdiction as to guard the public morals, the public safety, and the public health, as well as to promote the public convenience and the common good; and that it is with the state to devise the means to be employed to such ends, taking care always that the means devised do not go beyond the necessities of the case, have some real or substantial relation to the objects to be accomplished, and are not inconsistent with its own Constitution or the Constitution of the United States.

House v. Mayes, 219 U.S. 270, 281-82, 31 S. Ct. 234, 55 L. Ed. 213 (1911).

[15] The court notes that this discussion of the Tenth Amendment is not a consequence of any specific Tenth Amendment claim put forth by respondents. Indeed, respondents have not made such a claim and thus, no issue of standing to make such a claim is before this court. Rather,

The mere fact that a federal law displaces state action does not, in and of itself, signify Congressional overreaching. The Supreme Court has explicitly "upheld as constitutional any number of federal statutes enacted under the commerce power that pre-empt particular exercises of state police power." *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981). Thus, the Tenth Amendment does not prohibit Congress from displacing state laws enacted pursuant to state police power when Congress is acting pursuant to its Commerce Clause powers. As discussed previously, § 4248 was not enacted pursuant to Congress's Commerce Clause power or any other enumerated power. Statutes like § 4248, that purportedly are enacted pursuant to the Necessary and Proper Clause, yet are not obviously tied to an enumerated power, present a more complicated question. What might be "necessary" and certainly what might be "proper" to aid the federal government in the enforcement of criminal laws and its asserted power to prevent criminal conduct, particularly in this area not explicitly delegated to the federal government and historically reserved to the states, would logically be determined by reference to that reserved power. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 584-85, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985) (O'Connor, J., dissenting, joined by Justices Powell and Rehnquist) (explaining that the underlying principle in numerous Supreme Court cases (cited therein) is consistent: "state autonomy is a relevant factor in assessing

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the court examines the Tenth Amendment because it necessarily limits operation of the necessary and proper powers of the government and because, as a constitutional provision, it is pertinent to the characterization of any act of Congress as necessary or proper.

the means by which Congress exercises its powers"). In *New York v. United States*, 505 U.S. 144, 156, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992), the Supreme Court wrote,

> [Q]uestions [as to whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States] can be viewed in either of two ways. In some cases, the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution. *See, e.g., Perez v. United States*, 402 U.S. 146, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971); *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579 (1819). In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment. *See, e.g., Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985); *Lane County v. Oregon*, 7 Wall. 71, 19 L. Ed. 101 (1869). . . . This has been the Court's consistent understanding: "The States unquestionably do retai[n] a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those

powers to the Federal Government." . . . . (citation omitted).[16]

A. Limited Federal Action Historically in the Area of Commitment

Among other important factors, Congress has, prior to the enactment of § 4248, expressed an historical reluctance to overstep the bounds of federal authority in the area of civil commitment legislation. This reluctance has been expressed in legislative history and in the texts of various commitment statutes. Prior to 1984, Congress expressed doubt, on a number of occasions, about its authority to provide for the federal commitment of individuals acquitted on the basis of insanity. In a 1983 D.C. Circuit case, then Judge Scalia reviewed the legislative history pertaining to the enactment of civil commitment schemes for such individuals and Tenth Amendment concerns:

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[16] In *Patton*, the Tenth Circuit referred to powers traditionally reserved to the states when considering a challenge to a federal statute criminalizing possession of body armor, which it ultimately affirmed based on its interpretation of the pre-*Lopez* precedent of *Scarborough v. United States*, 431 U.S. 563, 575, 97 S. Ct. 1963, 52 L. Ed. 2d 582 (1977).

> We do not mean to suggest that subjects of traditional state concern are immune from congressional regulation when they fall within Congress's Article I powers. Our constitutional federalism is based on a one-way enumeration: the question is whether a particular authority has been vested in Congress, not whether it falls within the reserved powers of the states, which are defined only negatively. But evidence regarding traditional divisions of power between the states and the federal government can help to show how the Constitution's enumerations have been interpreted over time.

Patton, 451 F.3d at 632 n.8.

Congress has on a number of occasions considered providing for the commitment, nationwide, of federal defendants acquitted on grounds of insanity. . . . The most recent occasion brought forth a well considered analysis by the House Judiciary Committee of the major concern leading to rejection:

> The Committee recognizes that the Federal government is one of specifically enumerated powers. State governments, on the other hand, may act in any given area unless specifically prohibited by the Constitution. Commitment and treatment of the mentally ill has traditionally been left to the states pursuant to their *parens patriae* or general police power. The Federal government has no such authority. Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. Pa. L. Rev. 832 (1960). . . . [The report then considers in detail whether Congress has the constitutional authority to provide for a nationwide federal commitment procedure, but draws no firm conclusion.]
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> . . .
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> In view of these considerations, the Committee believes that a Federal procedure for the commitment of the dangerously mental [*sic*] disturbed would constitute an inappropriate interference with the balance of Federal and State powers. Moreover, such a procedure could constitute a precedent for further Federal involvement in the care of the mentally ill. Once the Federal Government takes on the task of caring for the dangerously mental [*sic*] ill that become involved in the Federal criminal system, Congress would

> > most likely be asked to expand the Federal role even further. For example, legislation might be proposed allowing the Federal Government to take over State mental health institutions, or to accept the transfer of those incarcerated there, when the State is allegedly not doing a satisfactory job. The Committee thus believes that the care of the mentally ill is a task that uniquely belongs within the *parens patriae* powers of the States.
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> H.R. Rep. No. 1396, 96th Cong., 2d Sess. 559, 561 (1980) (footnotes omitted).

United States v. *Cohen*, 733 F.2d 128, 137-38 (D.C. Cir. 1984) (bracketed material original).

Judge Scalia explained further that

> [t]he issue, of course, is whether such congressional action would run afoul of the Tenth Amendment, because legislative authority in the general field of lunacy is reserved to the states. That issue was raised, but not resolved by the Supreme Court's decision, in *Greenwood v. United States*, 350 U.S. 366, 76 S. Ct. 410, 100 L. Ed. 412 (1956), which involved federal treatment of a defendant found not competent to stand trial on federal charges. The narrow basis on which the Court found such treatment permissible—i.e., not barred by the Tenth Amendment—was that until the federal charges had been disposed of, the individual was properly in the custody of the United States. *Id.* at 375, 76 S. Ct. 410, ... If that is the only permissible basis for federal action in this field, then once the criminal custody is terminated, which may occur at the moment the defendant is acquitted,

> *see* Note, *Federal Commitment of Defendants Found Not Guilty by Reason of Insanity—Proposed Legislation,* 52 Iowa L. Rev. 930 (1967), the constitutional underpinnings of federal treatment may also dissolve.

Id. at 137 n.15.[17]

Within months of the *Cohen* case, and despite the concerns expressed in the legislative historycited therein, Congress enacted the Insanity Defense Reform Act of 1984 (IDRA), 18 U.S.C. § 17 and 18 U.S.C. §§ 4241-4247, which permits the federal civil commitment of insanity acquittees. However, that legislation, which also provides for the civil commitment of prisoners who are mentally ill and dangerous prior to the expiration of their sentences, *see* 18 U.S.C. § 4246, is extremely deferential to the states. The commitment schemes enacted by Congress prior to § 4248 give preference to state custody and recognize the appropriate arena of state police and *parens patriae* power. In fact, Congress explicitly described the limited role of the federal government with respect to civil commitment in the legislative history of IDRA.

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[17] Judge Scalia's comment suggests the constitutional relevance of legitimate federal custody to Congressional exercise of power over individuals in the federal prison system. While the *Greenwood* Court relied on the fact that the "petitioner came legally into the custody of the United States," *Greenwood*, 350 U.S. at 375, 76 S. Ct. 410 the Court did not rely on the fact of that custody as the basis of federal authority to act. Rather, the *Greenwood* Court relied upon the government's unexhausted power to prosecute federal offenses, and explained that the legislation authorizing such commitment in such circumstances involved an assertion of authority "auxiliary to incontestable national power." *Id.*

> Section 4246 covers those circumstances where state authorities will not institute civil commitment proceedings against a hospitalized defendant whose federal sentence is about to expire or against whom all criminal charges have been dropped for reasons related to his mental condition and who is presently mentally ill. At such a point the responsibility for the care of insane persons is essentially a function of the states. *The committee intends that this section be used only in those rare circumstances where a person has no permanent residence or there are no state authorities willing to accept him for commitment.* If criminal charges are dropped for reasons other than the mental condition of the defendant, such as insufficient evidence, but the defendant was mentally ill, the Attorney General would release the defendant to state authorities.

S. Rep. 98-225, P.L. 98-473 (Aug. 4, 1983, U.S. Code Cong. & Admin. News 1984, pp. 3182, 3432) (emphasis added). Courts have construed § 4246 consistently with this expression of Congressional intent. *See United States v. Chairse*, 18 F. Supp. 2d 1021, 1032 (D. Minn. 1998) ("Section 4246(a) . . . provides that certification by the Attorney General stating that there are no suitable arrangements for state custody is required before commitment proceedings may commence. 18 U.S.C. § 4246(a); . . . The reason for such a requirement is that it fulfills Congress' intent that 18 U.S.C. § 4246 be used only in those rare circumstances where a person has no permanent residence or there are no State authorities willing to accept him for commitment.' . . . It is further noted that Congress' intent to limit the use of 18 U.S.C. § 4246 is due to the belief that care and treatment for the mentally ill is the function of the states rather than federal government. . . ." (Citations omitted)).

At oral argument, the government argued that whatever power or authority permitted Congress to enact § 4246 also permitted the enactment of § 4248, which contains a similar commitment scheme applicable to a more specific type of dangerousness. (Trans. at 38.)[18] A comparison of § 4246 and § 4248 illustrates that § 4248 renders a much larger group of individuals eligible for federal commitment and identifies additional instances in which Congress incorporated deference to the states in its limited authorization of the civil commitment of mentally ill and dangerous individuals in § 4246. Section 4246 differs from § 4248 in three significant ways: 1) under § 4246, the federal government must attempt to secure state placement for custody and care in three specific contexts: *prior to certifying* any hospitalized federal prisoner for commitment, *immediately after* obtaining a commitment order, *and periodically for the duration of the person's commitment* after assuming responsibility for the committed individual; 2) the individual capable of certifying candidates for commitment under § 4246 is specifically identified as the "director of a facility in which a person is hospitalized;" and 3) the group of people eligible for commitment is far more circumscribed under § 4246. Each of these distinguishing factors highlights the very different purpose of § 4248; while § 4246 was designed to provide for the civil commitment of mentally ill and dangerous individuals in federal custody in the rare circumstance in which a person has no permanent residence or no state authority is willing to accept the person, § 4248 is designed broadly to identify and confine all purportedly sexually dangerous persons who happen to be in the federal system.

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[18] The comparison of § 4246 and § 4248 raises the question why § 4248 was necessary if civil commitment of mentally ill and dangerous individuals is already possible under § 4246. Many states have both general civil commitment laws and commitment laws specifically geared toward sexual predators. The legislative history and academic writing about these state statutes indicate that sexual predator statutes are often created where dangerous sexual predators are unlikely to be committed under the general commitment provisions, either because the mental disorders afflicting such persons, such as antisocial personality disorder, would not qualify as "mental illness" under the general statutes or because incarcerated sex offenders had not committed recent overt acts, which were often prerequisite to commitment under general statutes. In addition, general commitment statutes were often designed to provide short-term treatment to individuals with serious mental disorders so they could be returned to the community while sex offender commitment statutes were designed to provide potentially long-term control, care and treatment of sexual predators. See Marc W. Pearce, *Civilly Committing Criminals: An Analysis of the Expressive Function of Nebraska's "Dangerous Sex Offender" Commitment Procedure*, 85 Nebraska Law Review 575, 582 (2007) (discussing Washington's Community Protection Act, which provides for the commitment of sexual predators, Wash. Stat. §§ 71.09.010 *et seq.*); Kan. Stat Ann. § 59-29a01(1994) and Kan. Stat. Ann. § 59-29a01 (1999) (setting forth legislative findings supporting enactment of sexually violent predator statute). This court has not located any legislative history suggesting that § 4246 is inadequate to civilly commit sexual predators.

Like § 4246, § 4248 clearly contemplates states ultimately being given the opportunity to assume responsibility for the care and custody of any prisoners civilly committed thereunder. *See* 18 U.S.C. § 4246(d) and § 4248(d). However, the states enter the commitment scheme at a significantly later point under § 4248 than under § 4246. Compare 18 U.S.C. § 4248(a) with 18 U.S.C. § 4246(a), calling into question the federal government's dominant role in the regulation of this area more traditionally governed by the states.

Under § 4246, the director of a facility does not even file a certificate unless "suitable arrangements for state custody and care of the person are not available," *see United States v. S.A.*, 129 F.3d 995, 1000 (8th Cir. 1997) ("By its own terms, section 4246 applies only in those unique situations where suitable arrangements for state care and custody are unavailable. As indicated above, to initiate commitment proceedings the director of the facility must certify that no suitable state arrangements are available."), cert. denied, 523 U.S. 1011, 118 S. Ct. 1200, 140 L. Ed. 2d 329 (1998), while under § 4248, certification as a sexually dangerous person, a hearing on that issue, *and* commitment all occur prior to *any* exploration of potential state custody and care. The § 4248 commitment proceedings are initiated by the federal government upon certification, and the statute merely instructs the Attorney General to make every effort to cause a state to assume responsibility for the custody care and treatment of the detainee *after commitment has been ordered.*

Moreover, under § 4246, even after assuming custody and care of a committed individual, "[t]he Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume responsibility for the person's custody, care and treatment." 18 U.S.C. § 4246(d). Despite the similarity of the rest of the language in § 4248(d), section 4248 does not have a similar requirement. In other words, the government is not required by § 4248 to make any periodic efforts to return an individual committed as a sexually dangerous person to his or her own state for care.

In *United States* v. *S.A.*, in response to a challenge by a juvenile to commitment under § 4246, the Eighth Circuit rejected the juvenile's argument that interpreting § 4246 to include commitment authority over federally adjudicated juveniles would infringe upon the rights of states to civilly commit mentally ill individuals. 129 F.3d at 1000. The court explicitly held that "the civil commitment authority of a state is not infringed by a commitment which occurs when state facilities are unavailable." *Id.* Section 4248's failure to incorporate deference to the states' police and *parens patriae* powers in the area of commitment is, given its textual similarity to § 4246, inexplicable, and, unlike the scheme set out in § 4246, authorizes a civil commitment scheme that impermissibly infringes upon the reserved powers of the states.

Section 4246 applies to federal prisoners whose sentences are about to expire, people who have been committed to the custody of the Attorney General pursuant to § 4241(d), and people against whom all criminal charges have been dismissed solely for reasons related to their mental condition ***IF*** those people have been hospitalized in a facility. Only the director of a facility in which a person is hospitalized may certify a person for commitment proceedings under § 4246. Thus, § 4246 contemplates the commitment of an individual that the BoP has transferred for evaluation or hospitalization and with respect to whom the BoP has taken on the obligation of treatment and care. While prisoners serving active sentences may be transferred voluntarily for evaluation, hospitalization, or treatment at the request of the BoP, any prisoner who objects to such a transfer is entitled to a hearing and a court order requiring such a transfer pursuant to § 4245. Thus, certification for commitment under § 4246 can only occur if the director of a facility *in which a person is hospitalized* certifies that 1) a person in one of the foregoing categories is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to the property of another AND 2) that suitable arrangements for state custody and care are not available.

Accordingly, the group of people eligible for commitment under § 4246 is far more circumscribed than the broad group covered by § 4248. Those eligible for commitment under § 4246 are those to whom the government has already taken on a certain responsibility and obligation by referring them for evaluation or committing them for treatment as mentally diseased or defective prisoners. Section 4246 allows the government to continue meeting its obligations of care for an individual who continues to suffer from mental illness and who is likely to continue to pose danger to others after the expiration of his sentence and to protect the safety and welfare of the community from the danger that could be posed by that individual if released. Importantly, although § 4246 allows for the commitment of individuals as to whom the government's power to prosecute has been exhausted, the federal government cannot even undertake certification unless suitable arrangements for state care and custody are unavailable.

As the Ninth Circuit wrote in *United States v. Sahhar*, 56 F.3d 1026, 1029-30 (9th Cir.), cert. denied, 516 U.S. 952, 116 S. Ct. 400, 133 L. Ed. 2d 320 (1995), addressing the defendant's concerns about the scope of the federal commitment statute, It is a truism that "[t]he passage of . . . [§] 4246 was not intended to be an invasion of the general field of lunacy, which is reserved to the states." *United States v. Clark*, 617 F.2d 180, 184 n.5 (9th Cir. 1990 [1980]). As we said in *Sahhar I*, the states have the principal responsibility for committing dangerous persons:

> Unlike most states, the federal government has chosen not to establish a comprehensive system of civil commitment, reserving to local authorities the principal task of committing dangerous, mentally ill persons. *Section 4246 thus is narrowly tailored to apply only to a particular concern of the federal government: dangerous persons charged with federal crimes but found incompetent to stand trial.*

[*United States v. Sahhar*, 917 F.2d 1197, 1203 (9th Cir. 1990) (*Sahhar I*), cert. denied, 499 U.S. 963, 111 S. Ct. 1591, 113 L. Ed. 2d 655 (1991)] (citations omitted). Section 4246 does not authorize wholesale, continuous federal detention of dangerous persons who have once been charged with a federal crime. The statutory scheme embodies a clear preference that a state assume responsibility. . . . It is . . . clear that the statute's authorization for indefinite federal commitment is a conditional one, contingent upon whether a state has declined to accept custody of the federal detainee.[19]

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[19] While section 4246 is not as limited as *Sahhar I* suggests because it also applies to prisoners whose sentences are about to expire, § 4246 limits the involvement of the federal government in all circumstances to the case in which a state will not assume responsibility, while § 4248 bestows broad powers of commitment upon the federal government

In contrast, commitment under § 4248 is not conditional or contingent upon state availability or assumption of responsibility. Despite the fact that much of the language used in § 4248 was drawn verbatim from the text of § 4246, the provisions incorporating deference to the states and thus limiting the scope and purpose of the statute were omitted.

In spite of the demonstrably broader language, the government argues that § 4248 is narrowly tailored to apply only to a particular concern of the federal government; persons in federal custody who are serving or have served their respective criminal sentences for federal crimes, who have engaged in sexually violent conduct or child molestation and who, because of their mental condition or abnormality, are likely to engage in sexually violent conduct or child molestation. Throughout its argument, the government focuses exclusively on the propriety of the commitments that will be made under § 4248 and emphasizes the ostensibly narrow group of individuals who may ultimately be committed under the statute as those "subject to the Act." (Trans. at 25.) However, the statute is so broadly applicable that the group of individuals actually subject to the Act (and the deprivations the Act entails, i.e., certification as sexually dangerous, psychiatric evaluation, delay of release from prison even if the prison sentence has been served in

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without incorporating deference to state authorities.

full[20]) is much larger than the group described by the government.

The very narrow group of people to whom § 4246 applies and the many restrictions within § 4246 recognizing the authority and reserved powers of state governments highlight the broad applicability, the breadth of purpose, and the extension of federal power represented by § 4248.

B. Federal Custody as a Jurisdictional Limitation on Congressional Power

The government's assertion that § 4248 addresses a concern of the federal government is essentially premised on the fact that all individuals subject to commitment under § 4248 are in federal custody. While the government makes frequent references to the significance of legitimate federal custody, the government does not argue that the fact of custody provides the source of Congressional power to act under the Necessary and Proper Clause. Rather, the government suggests that legitimate custody is a condition upon which the exercise of that federal power is contingent. (Trans. at 35 ("Congress has the necessary and proper authority to enact legislation to ensure that conduct it has the power to criminalize is not committed in the future 'particularly when and only when . . . the person is in federal custody so that the federal government has responsibility over that person's body.'").) The government thus offers the fact of federal custody as a limiting principle setting jurisdictional boundaries on Congressional action and restraining the federal government from exercising a general police power: "It's the fact of custody that's significant because otherwise the Tenth Amendment would come in and suggest the federal government would not have, for instance, wholesale authority to haul away any individual off the street and commit them because that person would be dangerous." (Trans. at 28; *see also id.* at 26-7.) In other words, according to the government, the fact of custody renders § 4248 a "proper" exercise of federal power; "where the person is actually in federal custody so that the federal government legitimately has power and control over that individual, the federal government also has the responsibility to ensure that it does not release to the general public those persons who will pose a danger, commit sexually violent conduct and molest its children as has been clinically found by a psychologist or a psychiatrist." (*Id.* at 27.)

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[20] For example, despite the fact that a prisoner may not ultimately be committed pursuant to § 4248, that prisoner may serve many months of additional imprisonment beyond his original sentence as a result of the government's decision to certify him as a sexually dangerous person.

The government explains that the text of § 4248 underscores the importance of legitimate federal custody, citing § 4248(g),[21] which requires the government to re lease any sexually dangerous person against whom charges are dropped for reasons unrelated to the person's mental condition, as evidence of Congress's appreciation of the fact that the federal government may not act to commit an individual who is suffering from a mental abnormality and likely to engage in sexually violent behavior if that individual is not "legitimately" in the custody of the BoP. (*See* Trans. at 32.) It is difficult to discern the difference, however, between the situation of a purportedly sexually dangerous individual legitimately in federal custody pursuant to § 4241 who is subsequently released because the charges against him were dropped for lack of evidence, on the one hand, and that of a purportedly sexually dangerous individual who has served time for his conviction in full, on the other. In both cases, when the charges are dropped (for reasons unrelated to mental condition) and when the sentence expires (for reasons unrelated to mental condition), the individual is no longer legitimately in federal custody. Under § 4248(g), the government can certify a § 4241 committee as sexually dangerous while he is legitimately in federal custody, but must release that person if the charges are dropped for reasons other than mental illness. Logically, to be consistent with the theory underlying § 4248(g), it would follow that the government could certify a prisoner as a sexually dangerous individual while the prisoner was serving time but, upon the expiration of his sentence, i.e., the end-point of legitimate federal custody, the government would be required to release the individual. In both cases, the continued

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[21] If the director of the facility in which a person is hospitalized or placed pursuant to this chapter certifies to the Attorney General that a person, against whom all charges have been dismissed *for reasons not related to the mental condition of the person*, is a sexually dangerous person, the Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried for the purpose of institution of State proceedings for civil commitment. If neither such State will assume such responsibility, the Attorney General shall release the person upon receipt of notice from the State that it will not assume such responsibility, but not later than 10 days after certification by the director of the facility.

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18 U.S.C. § 4248(g) (emphasis added). See also 18 U.S.C. § 4246(g) (same).

exercise of federal custody over the individual at issue would appear to be equally improper.

In support of its argument regarding the significance of federal custody, the government emphasizes respondents' concession that decisions about how to control federal prisoners are within the undisputed authority of the federal government and notes that when certification is made under § 4248, the prisoner in question is, at that time, in federal custody: "the reason again that federal custody is significant is because . . . the federal government has no doubt the legitimate regulatory goal of preventing danger to the community and . . . the government's interest in preventing crime by arrestees is both legitimate and compelling." (Trans. at 36-37.) At another point, the government argues: "Where, as here, Congress has the power to criminalize and punish such conduct . . . it has the necessary and proper authority to prevent their imminent or likely commission by persons *in federal custody*." (Brief at 10 (emphasis added).)

First, as discussed previously, the federal government does not have the authority to prevent generalized danger to the community. *See Perry*, 788 F.2d at 109 ("Congress . . . cannot sanction for the general welfare. . . . Congress may concern itself with the 'safety of the community' only to the extent that other specific grants of power so permit."). Second, preventing a prisoner from engaging in certain conduct while he is in federal custody serving a federal sentence or on federal supervised release is a different thing all together from preventing a person who is a federal prisoner from possibly engaging in certain conduct in the future after the expiration of his sentence that Congress does not have the authority to regulate. The fact of legitimate custody might be a sufficient basis for the exercise of control over an individual's conduct during the period of custody (including a period of supervised release)—but it does not establish Congressional authority to provide for the commitment of a person *after* a person has completed a sentence for a federal crime, i.e., when the power to prosecute federal offenses is exhausted, when that person has not committed any misconduct while in custody, and where there has been no showing that the person is likely to engage in conduct that Congress, as opposed to the states, actually has the authority to criminalize. The fact of federal custody, standing alone, shorn of the power to prosecute that was the linchpin of the *Greenwood* decision, does not render the § 4248 commitment scheme a "proper" exercise of Congressional power.

In sum, section § 4248 unnecessarily and improperly deprives the states of *parens patriae* and police powers and impermissibly intrudes upon an area historically regulated by the states. The broad scope of the statute and the failure to incorporate deference to the state police and *parens patriae* powers that have been recognized in other federal commitment schemes require the conclusion that § 4248 is not an appropriate means nor a means consistent with the letter and spirit of the Constitution of achieving a legitimate goal of the federal government and thus is unconstitutional.

III. The Clear and Convincing Standard of Proof as a Violation of Due Process

Section 4248 requires a court to find by clear and convincing evidence that an individual has engaged in sexually violent conduct or child molestation as a prerequisite to commitment. Respondents contend that the clear and convincing burden of proof is constitutionally inadequate in this context.

A standard of proof functions to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 370, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). "In cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.'" *Addington v. Texas*, 441 U.S. 418, 426, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979) (citation omitted). The Supreme Court has repeatedly recognized "that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Id.* Moreover, Supreme Court precedent teaches that due process "is flexible and calls for such procedural protections as the particular situation demands." *Jones v. United States*, 463 U.S. 354, 367-68, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983). Regardless of whether the commitment proceedings governed by § 4248 are accurately characterized as civil, the pertinent analyses in *In re Winship* and *Jones* indicate that the reasonable doubt standard should apply to the factual determination that an individual sought to be committed engaged or attempted to engage in sexually violent conduct or child molestation, which determination is a condition precedent to commitment under § 4248.

Failure to apply the reasonable doubt standard to such an antecedent factual finding required for commitment under § 4248 constitutes a denial of due process in this case as surely as it did in *Winship*. There, the Supreme Court reviewed a statute permitting a determination of juvenile delinquency and subsequent confinement based on a factual determination that the minor in question had engaged in conduct that would be considered criminal if the minor were an adult. The Court held that, given the liberty interests at stake, any such factual finding must satisfy the reasonable doubt standard even though the proceedings were civil and not criminal in nature. *Winship*, 397 U.S. at 366, 90 S. Ct. 1068. The *Winship* Court recognized that "the basic issue—whether the individual in fact committed a criminal act—was the same in both [criminal and delinquency] proceedings. There being no meaningful distinctions between the two proceedings, we required the state to prove the juvenile's act and intent beyond a reasonable doubt." *Addington*, 441 U.S. at 427-28, 99 S. Ct. 1804. *Winship* thus supports the proposition that where factual findings of criminal acts must precede the taking of an individual's liberty, those findings must be made beyond a reasonable doubt.

The government argues that, in the context of a § 4248 civil commitment proceeding, the clear and convincing burden of proof properly allocates the risk of an erroneous commitment between the parties, and that post-deprivation proceedings exist to cure any erroneous commitment. (Gov't Br. at 22-24.) As Justice Harlan noted in his concurring opinion in *Winship*, however, the complete loss of personal liberty through state-imposed confinement and the delinquency determination that stigmatizes the individual at issue are similar to the consequences that follow from a criminal conviction, and the gravity of the potential costs to the individual as a result of factual error demand the application of the reasonable doubt standard. 397 U.S. at 373-74, 90 S. Ct. 1068. The *Winship* majority shared Justice Harlan's concerns: "We made clear [in *Application of Gault*, 387 U.S. 1, 36, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967),] that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for '(a) proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.'" *Winship*, 397 U.S. at 365-66, 90 S. Ct. 1068. Similarly, here, despite the designated "civil" nature of the proceedings, the complete loss of personal liberty for a potentially indefinite time period through federally-imposed confinement and the undeniable stigma associated with being labeled a "sexually dangerous person," which surely equals or exceeds any stigma associated with juvenile delinquency, demand that a committing judge be convinced beyond a reasonable doubt that the individual committed some act on which the label and the indefinite confinement are premised.[22]

State courts asked to determine the appropriate standard of proof to apply in various state sex offender commitment statutes have relied on *Winship* to conclude that the reasonable doubt standard is required. In a post-*Addington* decision, the Washington Supreme Court concluded that the reasonable doubt standard should be applied to sexual psychopathy commitment proceedings, regardless of whether the proceeding was labeled criminal or civil, explaining that "'[t]he analogy to *Winship* is clear and persuasive, sufficient alone to warrant the [application of the reasonable doubt standard].' *Due Process Requires Proof Beyond Reasonable Doubt for Commitment of Sex Offenders*, 1975 Wash. U.L.Q. 1092, 1102 (1976)." *Washington v. Rinaldo*, 98 Wash. 2d 419, 655 P.2d 1141, 1145 (1982). *See also United States ex rel. Stachulak v. Coughlin*, 520 F.2d 931 (7th Cir. 1975) (in absence of explicit statutory direction, relying on *Winship* to hold that due process requires that the reasonable doubt standard be applied in proceedings under the Illinois Sexually Dangerous Persons Act), cert. denied, 424 U.S. 947, 96 S. Ct. 1419, 47 L. Ed. 2d 354 (1976); *People v. Burnick*, 14 Cal. 3d 306, 121 Cal. Rptr. 488, 535 P.2d 352 (1975) (with respect to now-repealed Mentally Disordered Sexual Offender law, due process required proof beyond a reasonable doubt in proceedings that led to the involuntary commitment of persons found to be sexual psychopaths regardless of "civil" nature of proceedings).

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[22] As in *Winship*, the fact that criminal consequences do not attach to the finding of criminal conduct does not lessen the seriousness and importance of the consequences of civil commitment. See *Winship*, 397 U.S. at 373-74, 90 S. Ct. 1068 (Harlan, J., concurring).

The *Coughlin* court's conclusion that the reasonable doubt standard be applied to findings that an individual is a sexually dangerous person under the Illinois statute was not based on a general conclusion that the statute was "criminal" in nature. Rather, despite the fact that the statute was presented as one permitting civil commitment of sexually violent individuals, the court concluded that the consequences of commitment, more substantial than those at issue in *Winship*, required the application of the reasonable doubt standard.

> Here, the loss of liberty is as great, if not greater, than the loss in *Winship*. The violator of the criminal law be he an adult or juvenile is imprisoned, if at all, in almost all cases for a definite term. The person found to be sexually dangerous, in stark contrast,

> is committed for an indeterminate period and is unable to attain his freedom until he can prove that he is no longer sexually dangerous. Likewise with respect to stigma an involuntary commitment for sexual dangerousness presents an *a fortiori* case: Unlike the delinquency proceedings in *Winship*, these actions are not confidential, and an adjudication of sexual dangerousness is certainly more damning than a finding of juvenile delinquency.

Coughlin, 520 F.2d at 935-36. The *Coughlin* court acknowledged that lower courts had previously held the need for mental treatment in civil commitment proceedings under the Illinois Mental Health Code need only be proved by clear and convincing evidence. The court did not find the use of the clear and convincing standard in general commitment proceedings determinative of the appropriate standard in sex offender commitment proceedings.

The government argues, however, that *Addington*, an involuntary civil commitment case, provides the more analogous context. In *Addington*, the Court weighed the individual's interest in not being involuntarily confined erroneously against the state's interest in committing the emotionally disturbed person for his own welfare and the protection of the community. That Court rejected the argument, made in reliance on *Winship*, that the reasonable doubt standard should apply to a civil commitment determination, 441 U.S. at 431, 99 S. Ct. 1804, instead holding that the clear and convincing standard of proof, at a minimum, would satisfy due process in a civil proceeding brought under state law to involuntarily commit an individual to a state mental hospital for an indefinite period of time, *id.* at 433, 99 S. Ct.

1804. The *Addington* Court devoted a significant portion of its discussion to the nature of the issue before the court in a general civil commitment proceeding under the Texas statute: whether the individual sought to be involuntarily committed was mentally ill and required hospitalization for his own welfare and for the protection of others.

> There may be factual issues to resolve in a commitment proceeding, but the factual aspects present only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists. Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous. . . . The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. The reasonable-doubt standard of criminal law functions in its realm because there the standard is addressed to specific, knowable facts. Psychiatric diagnosis, in contrast, is to a large extent based on medical "impressions" drawn from subjective analysis and filtered through the experience of the diagnostician.

Id. at 429-30, 99 S. Ct. 1804, The Court relied on the uncertainties of psychiatric diagnoses and predictions of future dangerousness as the bases for its conclusion that requiring proof beyond a reasonable doubt "may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment." *Id.* at 432, 99 S. Ct. 1804.[23]

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[23] *Hollis v. Smith,* 571 F.2d 685, 695 (2nd Cir. 1978), cited by the government, held the clear and convincing burden of proof constitutional when reviewing New York's sex offender statute where the questions before the court, like those relevant to Texas's general civil commitment statute at issue in Addington, concern "a person's character and the prospects for his future conduct, . . . To require proof of such elements beyond a reasonable doubt would either prevent the application of such statutes except in the most extreme cases or invite hypocrisy on the part of judges or juries." The New York statute, unlike § 4248, did not require a specific finding of criminal conduct as a prerequisite to commitment. Rather, the petitioner in that case was eligible for the criminal sentence of one day to life as a result of pleading guilty to a specific sexual offense, New York law provided that:

> any person convicted of assault in the second degree for an assault upon another with intent to commit the felony of rape in the first degree, rape in the second degree, sodomy in the first degree, sodomy in the second degree or carnal abuse may be punished by imprisonment for an indeterminate term, the minimum of which shall be one day and the maximum of which shall be the duration of his natural life.

Hollis, 571 F.2d at 687 (citing former section 243 of the New York Penal Law). Under that statutory scheme, the candidate for the indefinite sentence had already been found to have engaged in sexual violence beyond a reasonable doubt.

Likewise, while the government is correct that a federal district court in New Jersey recently approved that state's application of the clear and convincing evidence standard to commitments made pursuant to the New Jersey sex offender commitment statute, New Jersey Sexually Violent Predator Act, N.J.S.A. § 30.4-27.24 *et seq.*, *see Rivera v. Rogers,* No. 05-3385, 2006 WL 3399427, *12 (D.N.J. Nov. 20, 2006), no one is eligible for commitment under that statute unless he or she "has been convicted, adjudicated delinquent or found not guilty by reason of insanity for commission of a sexually violent offense [enumerated in the statute], or has been charged with a sexually violent offense but found to be incompetent to stand trial," N.J.S.A. § 30:4-27, 26. Accordingly, The substance of the *Addington* holding addresses only the difficulties that would be posed by the second prong of the § 4248 test—whether an individual is "sexually dangerous to others," i.e., whether the individual "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. § 4247(a)(6). It is this second prong of the § 4248 test that involves the psychiatric or psychological analysis that purportedly eludes the level of certainty required by the reasonable doubt standard. Here, as in *Addington*, there is a serious question as to whether the federal government could ever prove beyond a reasonable doubt that an individual is both suffering from a mental illness or abnormality such as pedophilia and unlikely to refrain from sexually violent conduct in the future as a result of that illness. Application of the clear and convincing standard to this second prong of the § 4248 test satisfies *Addington* without offending *Winship* and thus does not violate due process.[24]

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the New Jersey courts apply the clear and convincing standard of proof only to determine whether a person "suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for control, care and treatment." *Id.*

[24] It is worthy of note that the statutes governing delinquency proceedings in New York at issue in *Winship* currently provide that "[a]ny determination at the conclusion of a fact-finding hearing that a respondent did an act or acts must be based on proof beyond a reasonable doubt," N.Y. Fam. Ct. Act § 744, but that an adjudication made at the close of a dispositional hearing may be based on a preponderance of the evidence, N.Y. Fam. Ct. Act § 745. See *Matter of Kevin J.*, 108 Misc. 2d 1033, 438 N.Y.S. 2d 681, 684 (N.Y. Fam. Ct. 1981) (dispositional hearing is analogous to sentencing in adult criminal case and its purpose is to

However, the preliminary finding required by the first prong of § 4248—that someone is a "sexually dangerous person"—poses an explicit factual question answerable only with specific, potentially knowable facts, because it requires the court to find that "a person has engaged or attempted to engage in sexually violent conduct or child molestation[,]" 18 U.S.C. § 4247(a)(5). This inquiry is not subject to the subtleties, the nuances, and the fallibility of psychiatric diagnoses that concerned the *Addington* Court and provided the basis for its holding. Either a person has engaged in such conduct, or he has not. Applying a reasonable doubt standard to the purely factual finding that must precede commitment under § 4248 would not impose a burden that the federal government could not meet or that would disable or render less effective the commitment scheme. Nor would it erect an unreasonable barrier to needed medical treatment for sex offenders. Rather, it would enhance the reliability of the fact-finding determinations and thus the commitment decisions made by courts at the behest of the BoP.

Civil commitment under the Texas statute at issue in *Addington* was not premised upon a finding of criminal conduct of any kind. Thus, the *Addington* Court's observation regarding the Texas statute that "[u]nlike the

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provide assistance to court in evaluating all alternatives relevant to the disposition). See also *Matter of Luis R.*, 98 Misc. 2d 994, 414 N.Y.S.2d 997, 998 (N.Y. Fam. Ct. 1979) ("The delinquency hearing is a bifurcated affair, divided into a fact-finding stage and a dispositional stage, . . . It is at the fact-finding stage that the court determines by evidence beyond a reasonable doubt, whether the petition's allegations have been sustained. . . . At the dispositional hearing, the issues of treatment, confinement and supervision, or dismissal of the petition are considered. . . ." (citations omitted)).

delinquency proceeding in *Winship*, a civil commitment proceeding can in no sense be equated to a criminal prosecution," is not particularly pertinent to a discussion of commitment under § 4248, which explicitly requires a finding of criminal conduct prior to commitment. Importantly, this antecedent finding is not simply a gratuitous inquiry, it is a finding of criminal conduct, albeit without criminal consequences, that is an absolute prerequisite to civil commitment under § 4248 and, as such, brings the § 4248 civil commitment scheme squarely within the ambit of the *Winship* rationale.

This antecedent finding of fact takes on even greater importance when one considers the commitment scheme as a whole and the criteria for eligibility for commitment. Any person in the custody of the BoP, any person who has been committed pursuant to § 4241(d), and any person against whom charges have been dismissed solely for reasons pertaining to the mental condition of the person, is eligible for commitment under this statute, regardless of the nature of his criminal history or the charges against him. A criminal history of sexual violence or molestation is not required; for example, individuals convicted of and serving time for bank robbery, mail fraud, tax evasion, drug dealing, and sexual abuse of a child in the special maritime or territorial jurisdiction of the United States are all equally subject to certification and commitment under § 4248. Application of the reasonable doubt standard[25] to the anteced-

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[25] In its brief, the government asserts that nine states of 18 with sexually violent predator commitment statutes have legislatively or judicially adopted the clear and convincing standard for state commitment schemes. At least four of the state statutes cited by the government, however, apply only to individuals convicted of or charged with sexually violent behavior (Florida, Missouri, New Jersey, and Virginia), *See*

Florida (F.S.A. § 394.912(10(a))) ("sexually violent predator" is a person who "has been convicted of a sexually violent offense"); Missouri (Mo. Stat. § 632.480 defining "sexually violent predator" as person who "has pled guilty or been found guilty or been found not guilty by reason of mental disease or defect . . . of a sexually violent offense" or has been committed as criminal sexual psychopath before August 1980); New Jersey (N.J.S.A. § 30:4-27, 26 (defining "sexually violent predator" as, inter alia, a "person who has been convicted, adjudicated delinquent or found not guilty by reason of insanity for commission of a sexually violent offense, or has been charged with a sexually violent offense but found to be incompetent to stand trial")); Va. Code § 37.2-900 ("Sexually violent predator" means any person who "has been convicted of a sexually violent offense or has been charged with a sexually violent offense and is unrestorably incompetent to stand trial"). Nebraska (not cited by the government) also has a Sex Offender Commitment Act that uses a clear and convincing standard, but that statute also defines a "dangerous sex offender" eligible for commitment as one who "(a) . . . suffers from a mental illness which makes the person likely to engage in repeat acts of sexual violence, who has been convicted of one or more sex offenses, and who is substantially unable to control his or her criminal behavior or (b) a person with a personality disorder which makes the person likely to engage in repeat acts of sexual violence, who has been convicted of two or more sex offenses, and who is substantially unable to control his or her criminal behavior." Neb. Rev. Stat. §§ 71-1201 *et. seq.*, and Neb. Rev. Stat. § 83-174.01.

Moreover, ten additional states have legislatively or judicially adopted the reasonable doubt standard and also render individuals eligible for commitment only if they have been charged with or convicted of a sexual offense. (Arizona, California, Illinois, Iowa, Kansas, Massachusetts, South Carolina, Texas, Washington, Wisconsin). *See* Ariz. Rev. Stat. § 36-3701(7)(a) (requiring that a "sexually violent person" have been, inter alia, "convicted of or found guilty but insane of a sexually violent offense" or charged with such a crime or found incompetent to stand trial for such a crime); Cal. Welf. & Inst. Code § 6600(a)(1) (requiring that a "sexually violent predator" have, inter alia, "been convicted of a sexually violent offense against one or more victims"); 725 Ill. Comp. Stat. § 207/5(f) (requiring that a "sexually violent person" have, inter alia, "been convicted of a sexually violent offense," adjudicated delinquent for such an offense or found not guilt of such an offense by ent factual finding would more properly guard against the erroneous commitment of a person who had never engaged in sexually violent conduct or child molestation.

As the Supreme Court explained in *Jones*, 463 U.S. at 367-68, 103 S. Ct. 3043, "'[d]ue process is flexible and calls for such procedural protections as the particular situation demands.'" *Id.* (citation omitted).[26] The *Jones*

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reason of insanity); Iowa Stat. § 229A.2(11)(requiring that a "sexually violent predator" have been, inter alia, "convicted of or charged with a sexually violent offense"); Kan. Stat. Ann. § 59-29a02(a) (requiring that a "sexually violent predator" have been, inter alia, "convicted of or charged with a sexually violent offense"); Mass. Gen. Laws Ann. 123 A § 1 (requiring that a "sexually dangerous person" have been, inter alia, "convicted . . . of a sexual offense," adjudicated delinquent by reason of such an offense or found incompetent to stand trial for such an offense); S.C. Stat. Ann. § 44-48-30 (requiring that a "sexually violent predator" have been, inter alia, "convicted of a sexually violent offense"); Tex. Health & Safety Code § 841.003 (requiring that a "sexually violent predator" be a "repeat sexually violent offender" which is a person who has been, inter alia, "convicted of more than one sexually violent offense"); Wash. Stat. § 71.09.020(16) (requiring that a "sexually violent predator" have been, inter alia, "convicted of or charged with a crime of sexual violence"); Wis. Stat. § 980.01(7) (requiring that a "sexually violent person" have been, inter alia, "convicted of a "sexually violent offense").

While some of the states above allow commitment based on charges of sexually violent offenses where the individuals charged are found not guilty by reason of insanity or incompetent to stand trial, those states require that the person be found sexually dangerous beyond a reasonable doubt, as is the case in Kansas. Ariz. Rev. Stat. § 36-3707; Cal. Welf. & Inst. Code § 6604; 725 Ill. Comp. Stat. § 207/35(d); Iowa Stat. § 229A.7; Kan. Stat. Ann. § 59-20a07; Mass, Gen. Laws Ch. 123A § 15; S.C. Stat. § 44-48-100; Tex. Health & Safety Code § 841.062; Wash. Stat. § 71.09.060; Wis. Stat. § 980.05.

[26] With respect to flexibility, even the *Addington* Court, which held the clear and convincing burden to be the minimum required by due process in the commitment context, recognized that a heightened

Court's analysis suggests that the same standard of proof is not necessarily applicable to all civil commitment proceedings, but rather that the requirements of due process vary with the circumstances posed by the class of potential candidates for commitment. In *Jones*, the Supreme Court upheld the use of the preponderance of the evidence standard used in the District of Columbia's scheme of commitment for insanity acquittees, explaining that the "concerns critical to [its] decision in *Addington* [were] diminished or absent in the case of insanity acquittees." 463 U.S. at 367, 103 S. Ct. 3043. Rejecting the petitioner's invocation of *Addington*, the *Jones* Court wrote that the equation of the two situations ignored "important differences between the class of potential civil-commitment candidates and the class of insanity acquittees that justify differing standards of proof," *Id.*[27] In particular, the *Jones* Court noted that

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"clear, unequivocal and convincing" standard was appropriate in cases involving severe consequences similar to loss of liberty and factual issues susceptible of objective proof:

> In *Woodby v. INS*, 385 U.S. 276, 87 S. Ct. 483, 17 L. Ed. 2d 362 . . . (1966), dealing with deportation, and *Schneiderman v. United States*, 320 U.S. 118, 125, 159, 63 S. Ct. 1333, 87 L. Ed. 1796 . . . , dealing with denaturalization, the Court held that "clear, unequivocal, and convincing" evidence was the appropriate standard of proof. The term "unequivocal," taken by itself, means proof that admits of no doubt, a burden approximating, if not exceeding, that used in criminal cases. *The issues in Schneiderman and Woodby were basically factual and therefore susceptible of objective proof and the consequences to the individual were unusually drastic—loss of citizenship and expulsion from the United States.*

441 U.S. at 432, 99 S. Ct. 1804 (emphasis added).

[27] The Supreme Court explained that its holding in *Jones* was in accord "with the widely and reasonably held view that insanity acquittees constitute a special class that should be treated differently from other

the risk of error, i.e., committing an individual who was not actually mentally ill and dangerous, was greater under the scheme at issue in *Addington* than that at issue in *Jones*, and that the individual should not be required to bear that risk equally with society. In contrast, the insanity acquittee himself proves that the criminal act he committed was a product of his own mental illness. Similarly, the commitment in *Addington* imposed a greater stigma than the stigma created by commitment in *Jones*, which the Court described as insubstantial given the stigma of the insanity verdict itself.

Just as the *Addington* concerns were diminished in *Jones*, those concerns are exacerbated in the § 4248 context, and due process in this particular situation demands application of the reasonable doubt standard to the antecedent factual finding mandatory for commitment as a sexually dangerous person. Given the class of potential candidates for commitment, i.e., all federal prisoners regardless of their criminal backgrounds,[28] and the intent of the statute to prevent sexually dangerous persons from engaging in further sexually dangerous conduct, there should be no reasonable doubt that those committed under § 4248 have actually engaged or attempted to engage in at least one previous act of sex-

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candidates for commitment." *Jones*, 463 U.S. at 370, 103 S. Ct. 3043. Like insanity acquittees, sexually dangerous persons are a special class of people with respect to whom numerous states and now, the federal government, have taken steps to deal discretely, separate and apart from other candidates for commitment premised on generic mental illnesses.

[28] "[I]t is estimated that rape and sexual assault offenders account for . . . about 1% of those serving time in Federal prisons." Sex Offenders and Offenses, at 16-17 (Bureau of Justice Statistics rev. 2/6/1997).

ual violence or child molestation. As noted above, reducing the risk of error in these proceedings would not compromise the government's interests in the least. The stigma associated with being identified and committed as a sexually dangerous mentally ill individual is far greater than either the general mental illness at issue in *Addington* or the residual stigma attached to commitment following an insanity acquittee's successful invocation of the insanity defense. Accordingly, the reasoning adopted by the Supreme Court in *Jones* suggests strongly that application of the reasonable doubt standard to the antecedent factual finding required under § 4248 would be consistent with the Supreme Court's civil commitment jurisprudence, which has analyzed the due process protections necessary in differing circumstances and approved the application of different burdens of proof according to those circumstances.

To the extent that the government relies on the Supreme Court's decision in *Kansas v. Hendricks*, in support of its assertion that § 4248 does not violate due process, the argument is unavailing. While the government is correct that the *Hendricks* decision upheld a statute permitting civil commitment of sex offenders based on evidence of past sexually violent behavior combined with some additional factor such as mental illness or mental abnormality, the actual holding of *Hendricks* was limited. In response to the specific issue raised by the parties, the Court concluded that a statute requiring a finding of "mental abnormality" as opposed to a "mental illness" satisfied substantive due process requirements for commitment. In the course of its discussion, the Court reiterated its previous holdings: "[w]e have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards." *Hendricks*, 521 U.S. at 358, 117 S. Ct. 2072. The Court did not opine further in the *Hendricks* case on what exactly constituted proper procedures or proper evidentiary standards.

According to the government, § 4248 requires "some evidence of past sexually violent behavior," mental abnormality, and likelihood of dangerousness, and thus satisfies the standard set by the *Hendricks* decision. (Gov't Br. at 15.) It is worthy of note, however, that the *Hendricks* Court found that the KSVPA

> "unambiguously requires a finding of dangerousness either to one's self or to others as a prerequisite to involuntary confinement. Commitment proceedings can be initiated only when a person 'has been convicted of or charged with a sexually violent offense' and 'suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.' . . . The statute thus requires proof of more than a mere predisposition to violence; rather, it requires evidence of past sexually violent behavior. . . . As we have recognized, '[p]revious instances of past sexually violent behavior are an important indicator of future violent tendencies.'"

521 U.S. at 357-58. The charges and convictions that qualify as sexually violent offenses are expressly enumerated by the Kansas statute. In the case of a conviction, the past conduct already would have been proven beyond a reasonable doubt. Moreover, in the case of convicts, and in the case of charges that were not pursued as a result of incompetence or dropped due to the mental condition of the individual, and in the case of individuals found not guilty by reason of insanity, the Kan-

sas statute provides for a trial during which the state must prove beyond a reasonable doubt that the individual in question is a sexually violent predator. *See Hendricks*, 521 U.S. at 352-53, 117 S. Ct. 2072 (after the filing of a petition, a finding of probable cause to support a finding that an individual is a sexually dangerous person, a transfer to a secure facility and an evaluation, "a trial would be held to determine beyond a reasonable doubt whether the individual was a sexually violent predator"). Accordingly, the "evidence" required by the Kansas statute, which was upheld by the Supreme Court as one comporting with due process, provided far greater procedural protections for the individuals sought to be committed and far more reliable factual underpinnings for commitment decisions than available currently under § 4248 and, more specifically, committed only those who were found beyond a reasonable doubt to be sexually violent predators. *Hendricks*, therefore, cannot be used to support an argument that clear and convincing evidence of criminal conduct is constitutionally sufficient.

For the foregoing reasons, § 4248's failure to require a court to find beyond a reasonable doubt that a person has engaged or attempted to engage in sexually violent conduct or child molestation prior to permitting the individual's indefinite involuntary civil commitment as a sexually dangerous person constitutes a violation of due process.

Conclusion

Because the civil commitment scheme set forth at 18 U.S.C. § 4248 is not sufficiently tied to the exercise of any enumerated or otherwise identifiable constitutional power of Congress and because § 4248, as currently structured, is not a proper exercise of any power that Congress might constitutionally exercise, this court concludes that 18 U.S.C. § 4248 is unconstitutional[.] In addition, commitment pursuant to § 4248, as written, would constitute a violation of due process because such commitment, which is contingent upon a factual finding that an individual engaged in specific criminal conduct, is permitted based on a proof of such conduct by clear and convincing evidence. Application of the reasonable doubt standard to the factual finding required for commitment is necessary to ensure due process, particularly when the civil commitment scheme is generally applicable to all federal prisoners regardless of their individual criminal histories. The court emphasizes that its holding pertains only to 18 U.S.C. § 4248 and does not affect or pertain to the remaining provisions of the Walsh Act.

Given the court's conclusions in this Order, the court will not address the remaining substantive due process and equal protection arguments also raised by respondents. The court's omission of this discussion should not be read to suggest any conclusions as to the merits of those arguments. For the foregoing reasons, respondents' motions to dismiss are ALLOWED, and the government's petitions are DISMISSED.

Given the very substantial constitutional issues of first impression in these cases and the gravity of the concerns raised by the government, the court hereby RECOGNIZES the Notice filed by the government on 15 May 2007, and temporarily STAYS the effect of this Order pending receipt of, and the court's decision regarding, the government's forthcoming motion to stay the effective date of the release of the respondents from custody in each of the cases identified in the caption of this Order.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-7671 (L)
(5:06-HC-02195-BR)

UNITED STATES OF AMERICA,
PETITIONER-APPELLANT,

v.

GRAYDON EARL COMSTOCK, JR.,
RESPONDENT-APPELLEE

FILED: Mar. 10, 2009

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Motz, Judge Agee and Senior District Judge Cacheris.

For the Court

/s/ PATRICIA S. CONNOR, CLERK
PATRICIA S. CONNOR, CLERK

APPENDIX D

1. 18 U.S.C. 4241 provides:

Determination of mental competency to stand trial to undergo postrelease proceedings[1]

(a) MOTION TO DETERMINE COMPETENCY OF DEFENDANT.— At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

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[1] So in original. Probably should be "stand trial or to undergo postrelease proceedings".

(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and

(2) for an additional reasonable period of time until—

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit proceedings to go forward, the defendant is subject to the provisions of sections 4246 and 4248.

(e) DISCHARGE.—When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial or other proceedings. Upon discharge, the defendant is subject to the provisions of chapters 207 and 227.

(f) ADMISSIBILITY OF FINDING OF COMPETENCY.—A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

2. 18 U.S.C. 4246 provides:

Hospitalization of a person due for release but suffering from mental disease or defect

(a) INSTITUTION OF PROCEEDING.—If the director of a facility in which a person is hospitalized certifies that a person in the custody of the Bureau of Prisons whose sentence is about to expire, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for State custody and care of the person are not available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility, until—

(1) such a State will assume such responsibility; or

(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

(e) DISCHARGE.—When the director of the facility in which a person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the person or, on the motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that—

> (1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or
>
> (2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall—
>
> > (A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that

has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

(f) REVOCATION OF CONDITIONAL DISCHARGE.—The director of a medical facility responsible for administering a regimen imposed on a person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

(g) RELEASE TO STATE OF CERTAIN OTHER PERSONS.—If the director of a facility in which a person is hospitalized pursuant to this chapter certifies to the Attorney General that a person, against whom all charges have been dismissed for reasons not related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried for the purpose of institution of State proceedings for civil commitment. If neither such State will assume such responsibility, the Attorney General shall release the person upon receipt of notice from the State that it will not assume such responsibility, but not later than ten days after certification by the director of the facility.

(h) DEFINITION.—As used in this chapter the term "State" includes the District of Columbia.

3. 18 U.S.C. 4247 provides:

General provisions for chapter

(a) DEFINITIONS.—As used in this chapter—

(1) "rehabilitation program" includes—

(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;

(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;

(C) drug, alcohol, and sex offender treatment programs, and other treatment programs that will assist the individual in overcoming a psychological or physical dependence or any condition that makes the individual dangerous to others; and

(D) organized physical sports and recreation programs;

(2) "suitable facility" means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant;

(3) "State" includes the District of Columbia;

(4) "bodily injury" includes sexual abuse;

(5) "sexually dangerous person" means a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others; and

(6) "sexually dangerous to others" with respect a person, means that the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.

(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION.—A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court, except that if the examination is ordered under section 4245, 4246, or 4248, upon the request of the defendant an additional examiner may be selected by the defendant. For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245, the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, 4243, 4246, or 4248 for a reasonable period, but not to exceed forty-five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245, and not to exceed thirty days under section 4242, 4243, 4246, or 4248 upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.

(c) PSYCHIATRIC OR PSYCHOLOGICAL REPORTS.—A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the Government, and shall include—

(1) the person's history and present symptoms;

(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

(3) the examiner's findings; and

(4) the examiner's opinions as to diagnosis, prognosis, and—

(A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

(B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;

(C) if the examination is ordered under section 4243 or 4246, whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another;

(D) if the examination is ordered under section 4248, whether the person is a sexually dangerous person;

(E) if the examination is ordered under section 4244 or 4245, whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility; or

(F) if the examination is ordered as a part of a presentence investigation, any recommendation the examiner may have as to how the mental condition of the defendant should affect the sentence.

(d) HEARING.—At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

(e) PERIODIC REPORT AND INFORMATION REQUIREMENTS.—(1) The director of the facility in which a person is committed pursuant to—

(A) section 4241 shall prepare semiannual reports; or

(B) section 4243, 4244, 4245, 4246, or 4248 shall prepare annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued commitment. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct. A copy of each such report concerning a person committed after the beginning of a prosecution of that person for violation of section 871, 879, or 1751 of this title shall be submitted to the Director of the United States Secret Service. Except with the prior approval of the court, the Secret Service shall not use or disclose the information in these copies for any purpose other than carrying out protective duties under section 3056(a) of this title.

(2) The director of the facility in which a person is committed pursuant to section 4241, 4243, 4244, 4245, 4246, or 4248 shall inform such person of any rehabilitation programs that are available for persons committed in that facility.

(f) VIDEOTAPE RECORD.—Upon written request of defense counsel, the court may order a videotape record made of the defendant's testimony or interview upon which the periodic report is based pursuant to subsection (e). Such videotape record shall be submitted to the court along with the periodic report.

(g) HABEAS CORPUS UNIMPAIRED.—Nothing contained in section 4243, 4246, or 4248 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention.

(h) DISCHARGE.—Regardless of whether the director of the facility in which a person is committed has filed a certificate pursuant to the provisions of subsection (e) of section 4241, 4244, 4245, 4246, or 4248 or subsection (f) of section 4243, counsel for the person or his legal guardian may, at any time during such person's commitment, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be committed. A copy of the [illegible]ion shall be sent to the director of the facility in which the person is committed and to the attorney for the Government.

(i) AUTHORITY AND RESPONSIBILITY OF THE ATTORNEY GENERAL.—The Attorney General—

(A) may contract with a State, a political subdivision, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this chapter;

(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243, 4246, or 4248;

(C) shall, before placing a person in a facility pursuant to the provisions of section 4241, 4243, 4244, 4245, 4246, or 4248 consider the suitability of the facility's rehabilitation programs in meeting the needs of the person; and

(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter and in the establishment of standards for facilities used in the implementation of this chapter.

(j) Sections 4241, 4242, 4243, and 4244 do not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice.

4. 18 U.S.C. 4248 provides:

Civil commitment of a sexually dangerous person

(a) INSTITUTION OF PROCEEDINGS.—In relation to a person who is in the custody of the Bureau of Prisons, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons relating to the mental condition of the person, the Attorney General or any individual authorized by the Attorney General or the Director of the Bureau of Prisons may certify that the person is a sexually dangerous person, and transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is a sexually dangerous person. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by clear and convincing evidence that the person is a sexually dangerous person, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall place the person for treatment in a suitable facility, until—

(1) such a State will assume such responsibility; or

(2) the person's condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment;

whichever is earlier.

(e) DISCHARGE.—When the Director of the facility in which a person is placed pursuant to subsection (d) determines that the person's condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the person or, on motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person's condition is such that—

(1) he will not be sexually dangerous to others if released unconditionally, the court shall order that he be immediately discharged; or

(2) he will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment, the court shall—

(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the Director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

(f) REVOCATION OF CONDITIONAL DISCHARGE.—The director of a facility responsible for administering a regimen imposed on a person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that he is sexually dangerous to others in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

(g) RELEASE TO STATE OF CERTAIN OTHER PERSONS.—If the director of the facility in which a person is hospitalized or placed pursuant to this chapter certifies to the Attorney General that a person, against whom all charges have been dismissed for reasons not related to the mental condition of the person, is a sexually dangerous person, the Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried for the purpose of institution of State proceedings for civil commitment. If neither such State will assume such responsibility, the Attorney General shall release the person upon receipt of notice from the State that it will not assume such responsibility, but not later than 10 days after certification by the director of the facility.

OPPOSITION
BRIEF

No. 08-1224

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2008

UNITED STATES OF AMERICA,
Petitioner,

v.

GRAYDON EARL COMSTOCK, JR., et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Congress lacks the constitutional authority to establish an indefinite civil commitment program for any individual in Bureau of Prisons custody, for any reason, if that person is deemed to be "sexually dangerous."

2. Whether the Due Process Clause mandates the reasonable doubt standard for the factual determination required by 18 U.S.C. § 4248.

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STATEMENT

In July 2006, President George W. Bush signed the Adam Walsh Child Protection and Safety Act into law. Pub. L. No. 109-248, 120 Stat. 587 (2006). A component of the Act, codified at 18 U.S.C. § 4248, authorizes the federal government to seek indefinite commitment for those in Bureau of Prisons ("BOP") custody who are deemed to be "sexually dangerous persons." In September 2007, the district court in the Eastern District of North Carolina held § 4248 unconstitutional on two distinct grounds: (1) the federal government does not have the power to enact the law, and (2) section 4248 violates the Due Process Clause by imposing an unconstitutional burden of proof on the factual determination required for commitment. Pet. App. 24a. In its analysis, the district court addressed the government's argument invoking the Necessary and Proper Clause in support of Congress's power and concluded that § 4248 was not a valid exercise of that power. Pet. App. 52a-76a.

On January 8, 2009, the Fourth Circuit Court of Appeals affirmed the district court's holding that § 4248 exceeds Congress's power. The Fourth Circuit also considered and dismissed the government's argument that the Necessary and Proper Clause authorizes § 4248. Pet. App. 18a-20a. The Fourth Circuit expressly declined to address whether due process mandates the reasonable doubt standard for the factual determination. The government petitioned for rehearing en banc, but no judge of the Fourth Circuit called for a poll, and the petition for rehearing was denied. Pet. App. 96a.

As of this filing, other circuits are addressing various aspects of § 4248. *See United States v. Shields* (1st Cir. Case No. 09-1330); *United States v. Hernandez-Arenado* (7th Cir. Case No. 08-2520); *United States v. Tom* (8th Cir. Case No. 08-2345). On May 13, 2009, an Eighth Circuit panel held § 4248 constitutional as a "responsible exercise of federal power over individuals subject to continuing federal jurisdiction through a period of supervised release following service of a federal sentence." *United States v. Tom*, ___ F.3d ____, 2009 WL 1311612, at *11, 2009 U.S. App. LEXIS 10282 at *30 (8th Cir. 2009).

Section 4248 does not represent, as the government asserts, a mere amendment of and supplement to the general federal commitment scheme. Pet. Cert. 15. As a commitment scheme for sexually dangerous persons, § 4248 expands federal civil commitment into an area never before contemplated by the federal government, an area that has historically been the province of the states.

To date, 81 men have been certified as sexually dangerous persons under § 4248 in the Eastern District of North Carolina. Currently, 76 men remain incarcerated in the Eastern District of North Carolina under § 4248 certification; the vast majority are well past their BOP "release dates."

Respondents Comstock, Matherly, Revland and Vigil have been held in custody in a medium-security facility at FCI-Butner for over two years past their respective release dates. These four respondents have three-year terms of supervised release that remain to be served. As for Mr. Catron, after he was found not competent and not restorable, the government filed a "Certificate of Mental Disease or Defect and Dangerousness" under 18 U.S.C. § 4246. Two months later, the government withdrew the § 4246 certificate to certify him pursuant to § 4248. Throughout his § 4246 certification and during the initial period of his § 4248 certification, Mr. Catron was housed at the Federal Medical Center in Butner, North Carolina. Today, he remains incarcerated in the segregated housing unit of the FCI-Butner medium-security prison.

ARGUMENT

I. CERTIORARI REVIEW IS PREMATURE BECAUSE OTHER CIRCUITS ARE CURRENTLY ADJUDICATING ASPECTS OF § 4248 THAT ADDRESS THE EXTENT OF CONGRESS'S POWER TO ENACT THE STATUTE.

Contrary to the Government's view, this case is not the best vehicle for this Court to address the constitutionality of 18 U.S.C. § 4248. Although the Fourth Circuit declared § 4248 unconstitutional, its ruling covered a relatively narrow category of cases. The respondents in this case were either incarcerated for federal sex offenses, or in the case of Mr. Catron, charged with a federal sex offense but found incompetent. The Government seeks certiorari, however, to establish § 4248 jurisdiction over a far larger group of individuals. Section 4248 applies to individuals "in the custody of the Bureau of Prisons," and the government interprets this language broadly. In other circuits, it is seeking to apply § 4248 not just to individuals incarcerated for federal crimes, but also to individuals who are in Bureau of Prisons ("BOP") custody for reasons completely unrelated to the federal criminal justice system, and even to individuals who are not lawfully in BOP custody at all. For example, in *United States v. Hernandez-Arenado* (7th Cir. Case No. 08-2520), the Seventh Circuit is considering whether § 4248 commitment is proper for an immigration detainee who was lawfully in BOP custody for reasons unrelated to a federal criminal prosecution.[1] In *United States v. Shields* (1st Cir. Case No. 09-1330), the First Circuit is addressing, among other issues, whether an individual who is unlawfully in BOP custody is in "custody" for purposes of § 4248.[2]

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[1] In *United States v. Hernandez-Arenado*, the Seventh Circuit panel comprised of Circuit Judges Ripple, Rovner, and Evans heard oral argument on September 12, 2008. The Seventh Circuit has yet to issue an opinion.

[2] In *United States v. Shields*, the First Circuit docketed the appellant's notice of appeal on March 19, 2009. The First Circuit has not yet issued a briefing order.

As the Fourth Circuit recognized, these other litigations—by exploring the extent of § 4248's reach—do not simply raise collateral issues; they directly implicate the constitutionality of the statute in a way the present case does not:

> We further note that the expansive view of "custody" that the Government itself has urged in other § 4248 cases belies its contention that § 4248 constitutes a limited, necessary extension of the federal penal system. For example, in *United States v. Shields*, the Government maintained that § 4248 requires only that a person is "in custody" of the Bureau of Prisons, not that this custody is lawful. *See* Government's Mem. in Opp'n to Mot. to Dismiss at 1-3, *United States v. Shields*, 522 F. Supp. 2d 317 (D. Mass. 2007). Similarly, in a case currently on appeal before the Seventh Circuit, the Government argues that § 4248 validly applies to persons whom the federal government has never convicted of a crime–a rationale that would extend § 4248's reach to material witnesses, civil contempt detainees, and individuals in immigration detention. See *United States v. Hernandez-Arenado*, No. 08-278, 2008 U.S. Dist. LEXIS 44988, 2008 WL 2373747, at *3-5 (S.D. Ill. June 9, 2008). These arguments starkly conflict with the Government's attempt here to justify § 4248 as a narrow exercise of federal penal power.

Pet. App. 14a at n.7 (emphasis in original).

These pending cases address the heart of the question presented by this case: how far does § 4248 reach, and does that reach exceed the constitutional limits on Congress's power? By allowing these appeals to be litigated, this Court can ensure it avoids addressing the scope and constitutionality of § 4248 in a piecemeal fashion. The nuances and complexities of this statutory scheme—and how the government intends to operate it in practice—will be simplified through the crucible of circuit court adjudication. Waiting for these issues to run their course will conserve judicial resources.

Recently, in *United States v. Tom*, a panel of the Eighth Circuit held § 4248 constitutional as a "responsible exercise of federal power over individuals subject to continuing federal jurisdiction through a period of supervised release following service of a federal sentence." __ Fed. 3d at ___, 2009 WL 1311612, at *11, 2009 U.S. App. LEXIS 10282 at *30.[3] This holding presents a question involving the interplay between a term of supervised release and § 4248 commitment. The Eighth Circuit panel decision relies, in part, on the existence of an unexpired term of supervised release to find federal power. The decision does not, however, indicate how § 4248 commitment affects the term of supervision, nor does it clarify whether the existence of supervised release at the time of certification can justify indefinite civil commitment.

The Eight Circuit panel opinion in *Tom* leaves unresolved Mr. Tom's other constitutional challenges to § 4248. Mr. Tom argued in the district court that "(1) neither the Constitution's Commerce Clause nor Necessary and Proper Clause authorized Congress to enact the statute, (2) the statute violates due process and equal protection, and (3) the statute is a criminal sanction requiring the Government to establish sexual dangerousness beyond a reasonable doubt." *United States v. Tom*, 558 F. Supp. 2d 931, 934 (D. Minn. 2008). Because the district court and the Eighth Circuit panel only addressed Mr. Tom's first argument, these additional constitutional challenges will need to be reviewed. In short, the *Tom* litigation at this stage raises as many questions as it answers and is far from complete. By denying certiorari review, this Court can wait for the lower courts to fully adjudicate the other constitutional issues in *Tom*.

II. THE CORRECT QUESTION IS WHETHER 18 U.S.C. § 4248 LIES WITHIN CONGRESS'S POWER.

The proper question for this Court is whether the Fourth Circuit correctly held that Congress lacks the constitutional authority to establish an indefinite civil commitment program for any individual in BOP custody deemed to be sexually dangerous. This is the question asked and answered by the district court and the Fourth Circuit. Both lower courts found this commitment program to be outside the scope of Congress's constitutional authority. Pet. App. 3a, 52a.

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[3] Like the respondent in *Tom*, four of the five respondents in this case have terms of supervised release that remain to be served.

The government bifurcates the question presented by separating those persons in federal custody coming to the end of a federal criminal sentence from those found mentally incompetent to stand trial. Pet. Cert. (I). In the first category, the government narrows the plain language of the statute because § 4248 does not distinguish between those in BOP custody nearing the end of a federal criminal sentence and those in BOP custody for any other reason. Unlike 18 U.S.C. § 4246, which limits certification to hospitalized inmates nearing the end of their sentence, those found not competent, and those against whom all charges have been dismissed for mental health reasons, §4248 casts a wide net to find anyone in BOP custody for any reason eligible for § 4248 certification and commitment. *See Hernandez-Arenado*, (7th Cir. Case No. 08-2520); *see also* Pet. App. 66a-67a, 100a.

In the second category, and for the first time, the government's petition suggests separate relief for respondent Catron, who was found not competent and not restorable. Although the government asserts that the Fourth Circuit failed to bifurcate Catron's case in its analysis, the government overlooks its own failure to make that argument below. Pet. Cert. 29; Pet. App. 18a-19a at n.10. In its briefing to the Fourth Circuit, the government neglected to seek separate relief for respondent Catron; it simply referenced his status in the discussion of *Greenwood v. United States*, 350 U.S. 366 (1956), and it recognized that his case parallels that of the defendant in *Greenwood*. Pet. Cert. 30. The government should not have the opportunity to present to this Court the argument that Mr. Catron deserves separate constitutional treatment after it declined to seek such relief in the Fourth Circuit.

III. THE GOVERNMENT FAILS TO SHOW THE FOURTH CIRCUIT DECIDED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT.

The government relies on Rule 10(c) of the Supreme Court Rules in seeking certiorari review. While the government argues this case presents an "important question," Rule 10(c) also requires that the question "has not been . . . settled by this Court, or [that the lower courts' decision] conflicts with relevant decisions of this court." Far from conflicting with these decisions, the Fourth Circuit decision embraces them. *See Greenwood v. United States*, 350 U.S. 366 (1956); *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000). Pet. App 9a-12a, 18a-20a.

A. The government's reliance on the Necessary and Proper Clause fails to recognize that § 4248 operates as an independent assertion of federal power.

The government asserts that "Congress's judgment that the initiation of civil-commitment proceedings against a person already in federal custody is an appropriate—and therefore [a] necessary and proper—component of Congress's unquestioned power to enact criminal laws . . ." Pet. Cert. 14. Under the system of checks and balances established by the Constitution, however, it is not Congress that determines when its actions are appropriate, but the Judiciary that is tasked with that weighty duty. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

As held by this Court and recognized by the Fourth Circuit, "[the] Necessary and Proper Clause simply does not– in and of itself– create any Congressional power" Pet. App. 12a-13a. (citing *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960)). As a result, the government must tether its Necessary and Proper Clause argument for the constitutionality of § 4248 to an enumerated power.[4] Although § 4248 applies to all individuals "in the custody of the Bureau of Prisons," the government argues in this petition that § 4248 necessarily and properly derives from the power that placed the individual in BOP custody in the first place—the power to criminalize certain behaviors.

Specifically, the government argues that § 4248 "is a rational incident to the government's undisputed authority under Congress's Article I powers to enact criminal laws, provide for the operation of a penal system, and assume for the United States custodial responsibilities for its prisoners." Pet. Cert. 18. The argument that § 4248 commitment is a necessary and proper "component" of the power to enact criminal laws fails for two reasons.[5] First, it does not accord either with the text of § 4248 or with how the government intends to enforce § 4248 in practice. Second, whatever custodial authority Congress has over an individual based on his presence in BOP custody necessarily ends when that individual's lawful presence in BOP custody ends—such as at the expiration of his term of imprisonment.

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[4] In the district court and in the Fourth Circuit, the government "barely mentione[d]" the Commerce Clause (or any other enumerated power), contending that "the Necessary and Proper Clause, standing alone" provided the constitutional authority to enact § 4248. Pet. App. 9a n.5, 12a, 32a-33a. When pressed by those courts, however, the government acknowledged that § 4248 must flow from an enumerated power. Pet. App. 9a n.5, 32a at n.5.

[5] In the district court and the Fourth Circuit, respondents argued that § 4248 operates as a criminal punishment that violates the Double Jeopardy Clause, the Ex Post Facto Clause, the Eighth Amendment prohibition against cruel and unusual punishment and the Sixth Amendment right to a jury trial. The government's argument that § 4248 lies within Congress's power because it is a component of federal criminal law suggests that § 4248 actually operates as a criminal punishment dressed in "civil" clothing. As such, the government's argument in support of certiorari raises a host of complicated constitutional issues better adjudicated initially by the lower courts.

As an initial matter, the plain language of § 4248 undercuts the government's argument that commitment is a "component" of Congress's power to enact criminal laws pursuant to its enumerated powers. The statute does not require any connection to criminal prosecution. As the government has argued, certification and commitment under § 4248 extends broadly to reach any individual in BOP custody for any reason. Pet. App. 14a n.7. And, as the Fourth Circuit observed, the government's arguments in other § 4248 litigation implies that § 4248 could reach an array of individuals who have no connection to the criminal justice system, including material witnesses, civil contempt detainees, and immigration detainees. *Id.* In short, the plain language of § 4248 itself, the Fourth Circuit's decision, and the government's own arguments in other cases, all recognize that § 4248 expands federal power outside of the criminal context.[6]

Second, § 4248 authorizes the indefinite commitment of an individual as long as that person is in BOP custody at the time of certification. Physical presence in the BOP, in other words, authorizes the government to institute new proceedings that extend federal power over an individual beyond that authorized by whatever proceedings resulted in the original custody. As the district court observed,

> preventing a prisoner from engaging in certain conduct while he is in federal custody serving a federal sentence or on federal supervised release is a different thing all together from preventing a person who is a federal prisoner from possibly engaging in certain conduct in the future after the expiration of his sentence that Congress does not have the authority to regulate. The fact of legitimate custody might be a sufficient basis for the exercise of control over an individual's conduct during the period of custody (including a period of supervised release)–but it does not establish Congressional authority

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[6] As discussed in Section I of this Brief in Opposition, these other cases are currently being adjudicated by other circuits. The opinions of these other circuits will provide this Court with a better vehicle to address the comprehensive scope of § 4248.

> to provide for the commitment of a person *after* a person has completed a sentence for a federal crime, i.e., when the power to prosecute federal offenses is exhausted, when that person has not committed any misconduct while in custody, and where there has been no showing that the person is likely to engage in conduct that Congress, as opposed to the states, actually has the authority to criminalize. The fact of federal custody, standing alone, shorn of the power to prosecute that was the linchpin of the *Greenwood* decision, does not render the § 4248 commitment scheme a "proper" exercise of Congressional power.

Pet. App. 75a-76a (emphasis in original). Section 4248 does not represent a mere exercise of valid federal authority; rather, it operates as an independent assertion of additional federal power, initiated by its own certification and commitment scheme, and temporally and causally distinct from the enumerated federal power that placed an individual in BOP custody.

B. The Fourth Circuit properly applied this Court's decisions in *United States v. Lopez* and *United States v. Morrison* to find 18 U.S.C. § 4248 exceeds the bounds of Congress's authority.

The government argues that § 4248 necessarily and properly derives from the government's criminal powers, and acknowledges the Commerce Clause represents the enumerated power from which the majority of federal criminal statutes derive. Pet. App. 9a n.5. The government's argument overlooks, however, that the federal government "enact[s] criminal laws," not as a matter of general right, but in a manner constitutionally limited by the derivative nature of the federal criminal statutes themselves. One must view the power that the government claims—the power to run a penal system—not as a general police power with a panoply of incident powers such as those exercised by the states, but through the filter of the enumerated powers upon which the criminal statutes themselves are based, i.e., the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const. Art. I § 8.

Through this filter, the tenuous nature of the government's petition becomes apparent. The government's petition requires this Court to hold that regulating commerce between the several states necessarily and properly allows the BOP to indefinitely detain anyone it deems to be sexually dangerous. This contention cannot stand because it requires the government to pile inference upon inference and leads to a "general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567-68.

The Fourth Circuit properly engaged this Court's Commerce Clause analysis, determining that § 4248, "like the statutes at issue in *Lopez* and *Morrison*, . . . contains no jurisdictional requirement limiting it to commercial or interstate activities. Nor does . . . [it] target the channels of interstate commerce or persons and things in interstate commerce. Therefore [it can only be upheld] if it regulates activities which 'substantially affect' interstate commerce." Pet. App. 10a. Upon making this determination, the Fourth Circuit looked to this Court's analysis of the Violence Against Women Act, which was the subject of *Morrison*, and determined that it "foreclosed any . . . argument" that § 4248 regulated an activity that substantially affects interstate commerce. Pet. App. 10a. In reaching its conclusion, the Fourth Circuit cited *Morrison*'s finding that, "the regulation and punishment of intrastate violence . . . has always been the province of the States. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Morrison*, 529 U.S. at 618-19.

The federal government is one of prescribed, limited, enumerated powers. As stated by this Court in *N.L.R.B v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and emphasized by the district court and court of appeals below, the power of the federal government "must be considered in light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Id.* at 37. Concern about the extension and attenuation of federal power arises not only when Congress exercises an enumerated power, such as the Commerce Clause, but also when the Necessary and Proper Clause purportedly provides authority for a particular law. Absent this interpretation, any attempt to cabin Congress to its constitutional role would be futile as Congress could simply raise the Necessary and Proper Clause as a cure.

The connection between the enumerated powers that allow Congress to enact criminal laws and the institution of an independent civil commitment scheme for any person in BOP custody presents the weakest link in the inferential chain between the Constitution and civil commitment under § 4248. This Court's precedents do not allow the government to merely acknowledge a connection between enumerated powers and the federal criminal justice system and then move on. Pet. Cert. 17. The government cannot glide over this essential step in the analysis; it must fully engage the question asked and answered by the district court and the Fourth Circuit: does § 4248 commitment require this Court to pile inference upon inference in such a way that it leads to a general federal police power? *Lopez*, 514 U.S. at 567-68.[7]

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[7] *Lopez*, in addition to providing the necessary understanding of the limits of Congress's Commerce Clause authority, also addresses the application of the Necessary and Proper Clause. Specifically, the government in *Lopez* presented, and this Court considered and rejected, the assertion that "evidence adduced and findings made in the course of . . . prior legislative proceedings make clear that the Gun-Free School Zones Act is a permissible exercise of Congress's power under the Commerce Clause, as well as a law '*necessary and proper for carrying into Execution*' that power." Brief for Government at 44, *United States v. Lopez*, 514 U.S. 549 (1995) (No. 93-1260), *available at* 1994 WL 242541, LEXIS 1993 U.S. Briefs 1260 (emphasis added).

C. The Fourth Circuit correctly applied *Greenwood v. United States.*

The Fourth Circuit found the government's attempt to stretch the holding in *Greenwood* off the mark. Pet. App. 18a. When the *Greenwood* Court addressed the constitutionality of federal civil commitment, it relied on specific factors to find the civil commitment scheme in place at that time constitutional: (1) the defendant was mentally incompetent; (2) his release would endanger the interests of the United States;[8] and (3) the federal power to prosecute was not exhausted. *Greenwood*, 350 U.S at 375. In its discussion, the *Greenwood* Court also recognized the general preference for state custody for those who are mentally disabled. *Id.* at 374. Pertinent to the instant case, the *Greenwood* Court was careful to recognize the limits of its holding: "We reach the narrow constitutional issue raised by commitment in the circumstances of this case. The petitioner came legally into the custody of the United States. The power that put him into such custody—the power to prosecute for federal offenses—is not exhausted." *Id.* at 375. Even though there was little likelihood Mr. Greenwood would recover, the Court stated: "We cannot say that federal authority to prosecute has now been irretrievably frustrated." *Id.*

In its petition, the government ignores *Greenwood*'s narrow reasoning, anchored by the unexhausted "power to prosecute," to assert that governmental authority over Mr. Greenwood stems not from the power to prosecute but from the lawfulness of his custody. Overlooking how Mr. Greenwood came into federal custody in the first place, the government insists the federal authority of his commitment did not depend on the government's ability to prosecute him but rather relied on the primary purpose of commitment statutes. Pet. Cert. 23. This reasoning ignores what occurred in *Greenwood* –without the pending indictment, the federal government was simply without authority to re-arrest Mr. Greenwood. *Greenwood*, 350 U.S. at 372, 375. As the Fourth Circuit stated, "*Greenwood* simply upholds a statute that permits the federal civil commitment of a person charged with federal crimes *but found incompetent to stand trial.*"[9] Pet. App. 18a (emphasis in original) (citing *Greenwood*).

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[8] *Greenwood* contains an essential distinction from § 4248– a specific reference to federal interests. *See Greenwood*, 350 U.S. at 375. Section 4248 contains no such specific connection to a federal interest. This language is not mere surplusage, but provides an essential jurisdictional nexus present in *Greenwood* and lacking from § 4248. *See Lopez*, 514 U.S. at 562 (noting the importance of an "express jurisdictional element" in a statute when conducting federalism analysis).

Seeking to bolster its custodial argument, and relying on dicta from the circuit court opinion in *Greenwood*, the government next argues that civil commitment justifies doing whatever is necessary to protect the public. Because the "primary purpose of the commitment statutes is not to facilitate prosecution but to protect the public and provide care to the person over whom the federal government already has lawfully exercised control . . . ," the government has the "undoubted right" to do whatever can be done to protect society. Pet. Cert. 23-24 (citing *Greenwood v. United States*, 219 F.2d 376, 387 (8th Cir. 1955)). Again, the government misses the point. Choosing to ignore that Mr. Greenwood was never prosecuted nor convicted, the government expands the lower court decision to glean a generalized right to protect society. From this generalized right, the government argues for the validity of post-conviction commitment by finding that *Greenwood* superimposes a Congressional power over those "who have not only been indicted but also convicted of federal crimes." Pet. Cert. 24. The government goes too far; this extrapolation of *Greenwood* is simply not available because the *Greenwood* Court never considered the constitutional validity of post-conviction commitment and explicitly limited its holding. The government fails to heed the conclusion in *Greenwood*: "We decide no more than the situation before us presents and equally do not imply an opinion on situations not now before us." *Greenwood*, 350 U.S. at 376. Because the Fourth Circuit properly applied this Court's ruling in *Greenwood*, further review by this Court is unnecessary.

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[9] In addition to the Fourth Circuit, the Court of Appeals for the District of Columbia Circuit has recognized the limits of *Greenwood*, noting that the question of "whether Congress has the constitutional authority to provide for a nationwide federal commitment procedure" was "raised but not resolved" by *Greenwood*. *United States v. Cohen*, 733 F.2d 128, 137 & n.15 (D.C. Cir. 1984).

IV. CERTIORARI REVIEW IS UNNECESSARY BECAUSE THE DISTRICT COURT CORRECTLY HELD § 4248 VIOLATES THE DUE PROCESS CLAUSE.

The district court struck down § 4248 on two distinct grounds. First, it held that Congress lacked the authority to enact § 4248; the Fourth Circuit affirmed this holding. The district court also struck down § 4248 because it imposes the clear and convincing burden of proof on a factual determination that requires the reasonable doubt standard. The Fourth Circuit expressly declined to reach this additional holding by the district court. Certiorari is unnecessary because the district court correctly held § 4248 violates the Due Process Clause as explained by its analysis of *In re Winship*, 397 U.S. 358 (1970), and *Addington v. Texas*, 441 U.S. 418 (1979).

Respondents, relying on *Winship* and *Addington*, argued in the district court that § 4248 improperly employs the clear and convincing burden of proof to determine whether a respondent "has engaged or attempted to engage in sexually violent conduct or child molestation." Pet. App. 76a-77a. The district court agreed, holding that due process mandates the application of the reasonable doubt standard. Pet. App. 93a.[10]

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[10] Respondents argued below that the reasonable doubt standard should apply to *all* factual determinations required for § 4248 commitment, including the determination that an individual "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." The district court rejected this argument, but it provides an additional basis for upholding the Fourth Circuit's judgment in this case. Pet. App. 84a.

In *Winship*, this Court held that adjudicating a juvenile delinquent requires proof of facts beyond a reasonable doubt. 397 U.S. at 368. The opinion noted that, although juvenile proceedings are civil proceedings designed to help children, "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards" where the loss of liberty is "comparable in seriousness to a felony prosecution." *Id.* at 365-66 (internal quotation omitted). Application of *Winship* to the present case demonstrates that the clear and convincing standard set forth in § 4248(d) does not satisfy due process. First, as in *Winship*, § 4248 implicates the exact concerns that mandate the use of the reasonable doubt standard in criminal cases—a loss of liberty upon an adjudication that the individual is sexually dangerous. *Id.* at 363. Second, the "civil" label applied to the hearing under § 4248 does not reduce the need for the safeguard of the reasonable doubt standard.

Addington v. Texas bolsters this conclusion. *Addington* re-affirmed *Winship*, expressly distinguished it, and further clarified the application of due process to factual findings in civil commitment proceedings. In *Addington*, this Court held that due process permits a clear and convincing standard of proof in making mental health determinations about an individual, recognizing that such determinations necessarily involve such a lack of certainty that application of the reasonable doubt standard places too high a burden on the government. 441 U.S. at 419-20, 29.

In so ruling, this Court re-affirmed and distinguished *Winship*, stating that a mental health commitment, "[u]nlike the delinquency proceeding in *Winship*, . . . can in no sense be equated to a criminal prosecution." *Id.* at 428. *Winship* and *Addington*, read together, hold that the government may impose the clear and convincing standard of proof to mental health determinations in a civil commitment proceeding, but that it must apply the reasonable doubt standard to findings of criminal-type behavior that form the factual basis for civil or criminal commitment. Because the plain language of the statute mandates the application of the clear and convincing burden of proof to determine whether an individual "has engaged or attempted to engage in sexually violent conduct or child molestation," the district court correctly held the statute unconstitutional.

In the event this Court grants certiorari, respondents request that this Court order the parties to address whether the Due Process Clause mandates the application of the reasonable doubt standard to the factual determination required by § 4248. This issue presents a question of pure law that the parties fully litigated in the district court and briefed to the Fourth Circuit. By addressing this question as part of certiorari review, this Court will exercise judicial economy by preventing piecemeal litigation in the Fourth Circuit.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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This the 20th day of May 2009.

REPLY BRIEF

No. 08-1224

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GRAYDON EARL COMSTOCK, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The United States Court of Appeals for the Fourth Circuit held that 18 U.S.C. 4248 is unconstitutional because it exceeds Congress's powers under Article I of the Constitution. Pet. App. 3a. That invalidation of an Act of Congress is itself a compelling reason for granting review. See Pet. 14-15. That is especially so because the vast majority of all of the Section 4248 proceedings in the Nation are pending in the Fourth Circuit (Pet. 16 & n.10), and in the absence of review by this Court, those proceedings would have to be dismissed. Moreover, as discussed below, since the petition for a writ of certiorari was filed, a circuit split has developed. Respondents present no good reason why this case is not the best vehicle for considering whether Congress has the power to protect the public against the release of federal inmates who suffer from a serious mental illness, abnormality, or disorder and are sexually dangerous to others. The petition for a writ of certiorari should be granted.

A. There Is Now A Circuit Split On The Constitutionality Of An Important Federal Statute

1. As explained in the petition (Pet. 14-15), this Court often grants certiorari, even in the absence of a circuit conflict, when a court of appeals has held an Act of Congress unconstitutional. The petition also explained (Pet. 16) that, because the principal Bureau of Prisons (BOP) facility for treating sex offenders is located in North Carolina, the invalidation of Section 4248 by the Fourth Circuit is uniquely harmful to the statute's implementation. As a result, this case was already a prime candidate for certiorari when the petition was filed.

Since that time, however, the need for this Court's review has become even more compelling: there is now a conflict between the only two appellate decisions that have addressed whether Congress had the authority under Article I of the Constitution to enact Section 4248. In this case, the Fourth Circuit held that Section 4248 "lie[s] beyond the scope of Congress's authority." Pet. App. 3a. On May 13, 2009, however, the Eighth Circuit held that Section 4248 "is a rational and appropriate means to effectuate legislation authorized by the Constitution," that civil commitment of a federal inmate who has been convicted of sex offenses lies within Congress's "ancillary authority under the Necessary and Proper Clause," and that Section 4248 "does not upset the delicate federal[-]state balance mandated by the Constitution." *United States* v. *Tom*, No. 08-2345, 2009 WL 1311612, at *7, *8, *10.

Respondents imply that the Eighth Circuit's holding in *Tom* might be limited to civil-commitment authority "over individuals subject to continuing federal jurisdiction through a period of supervised release following service of a federal sentence," Br. in Opp. 1-2 (quoting *Tom*, 2009 WL 1311612, at *11), but they do not claim that *Tom* can be distinguished from this case on that ground or that it minimizes the circuit split. To the contrary, they admit that, "[l]ike the respondent in *Tom*, four of the five respondents in this case have terms of supervised release that remain to be served." *Id.* at 5 n.3.

2. Rather than deny the existence of the circuit split, respondents suggest that this Court should wait for a case that might better "explor[e] the extent of [Section] 4248's reach" by addressing factual scenarios that respondents believe lie further beyond Congress's legitimate reach than their own cases. Br. in Opp. 4. That argument for denying certiorari might make sense if the Fourth Circuit had *sustained* Section 4248's application to respondents, because the Court might then await another case to consider whether the statute nonetheless is unconstitutional in other applications. The Fourth Circuit, however, affirmed a district court decision (Pet. App. 28a-29a) that *invalidated* Section 4248 in all of its applications, concluding broadly that the establishment of a civil-commitment regime for sexually dangerous persons in federal custody is beyond Congress's authority. That categorical ruling warrants this Court's review now.

Even assuming that other cases might present questions about the furthest reach of Congress's authority —an assumption not borne out by the cases respondents cite[1]—postponing review for one of those cases would not necessarily "conserve judicial resources." Br. in Opp. 4. A decision by this Court, for example, that Section 4248 cannot be applied to persons whose BOP custody was unlawful still would not answer the question that is squarely presented in this case: whether Section 4248 can be applied to persons, like respondents, who were indisputably in lawful BOP custody when they were certified as "sexually dangerous" and who indisputably fall within the scope of the statute. The Fourth Circuit held that Section 4248 is unconstitutional even in those circumstances, and that holding warrants this Court's review.

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[1] Neither of the two cases respondents discuss (Br. in Opp. 3-4) would be a better vehicle for considering Section 4248's constitutionality. In *United States* v. *Hernandez-Arenado*, No. 08-2520 (7th Cir. argued Sept. 12, 2008), the respondent is a Mariel Cuban, an alien whose immigration parole was revoked, who was detained by the Immigration and Naturalization Service in 1987, and who has since then been held in BOP facilities. See *United States* v. *Hernandez-Arenado*, No. 08-278, 2008 WL 2373747, at *1 (S.D. Ill. June 9, 2008). He has not presented a constitutional challenge to Section 4248, but instead has argued that he was not "in the custody of the Bureau of Prisons" within the meaning of Section 4248(a) when the government certified him as sexually dangerous. Moreover, *Hernandez-Arenado* would present different constitutional considerations, because an inadmissible alien is not a citizen of any State and is subject to Congress's "plenary" authority. *Kleindienst* v. *Mandel*, 408 U.S. 753, 769 (1972).

In *United States* v. *Shields*, No. 09-1330 (1st Cir. notice of appeal docketed Mar. 19, 2009), no briefs have been filed on appeal. Respondents assert (Br. in Opp. 3) that *Shields* presents a question about whether Section 4248 applies to a person who is "unlawfully" in BOP custody. That characterization stems from Shields's claim that his release date should have been two days earlier to correct an administrative error that denied him credit for previous time served—which would mean that he was certified the day after, rather than the day before, his sentence expired. The district court, however, treated Shields as in lawful BOP custody and described him as serving a 57-month prison term for a child-pornography offense at the time of his certification. *United States* v. *Shields*, 522 F. Supp. 2d 317, 322-323 (D. Mass. 2007). That ruling substantially limits the likelihood that any constitutional analysis on appeal in *Shields* will explore the broader questions respondents raise about "the extent of § 4248's reach" (Br. in Opp. 4).

B. The Petition Properly Addresses The Constitutionality Of Section 4248 As Applied To Persons In Respondents' Circumstances

Respondents suggest that the government has inappropriately sought to "narrow[] the plain language of the statute" (Br. in Opp. 6) by focusing in its question presented (Pet. i) on (1) "persons who are already in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences," and (2) "persons who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial." Those two categories of persons, however, are the categories within the scope of the statutory text that are represented by respondents in this case. The government consistently has argued that the statute is constitutional as applied to persons in those categories, and the court of appeals held otherwise. It thus makes sense for this Court to analyze whether the statute can be constitutionally applied to those two categories of individuals.[2]

With regard to the first category—those in BOP custody—the statutory text does not limit itself to persons who are nearing the end of a federal criminal sentence.

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[2] That is not to say, of course, that the statute cannot also be constitutionally applied to other persons, such as those "against whom all criminal charges have been dismissed solely for reasons relating to [their] mental condition." 18 U.S.C. 4248(a). The proceedings against respondents, however, do not present such a question.

But the government's framing of the question presented does not provide respondents with any cause for complaint. That framing was designed to describe the precise position of four of the respondents, as well as to pose the constitutional question at issue in what respondents would agree is its starkest form. Respondents defend the court of appeals' distinction between the federal government's "broad powers over persons *during* their prison sentences" and its supposed inability to provide for commitment "*after* the expiration of their prison terms." Pet. App. 14a; see Br. in Opp. 8. The government's reference to persons "coming to the end" of their prison sentences (as opposed, for example, to persons just beginning to serve their sentences) was similarly meant to identify the most difficult cases, in which a certification will result in commitment after a person's term of imprisonment ends.

With regard to the second category of persons mentioned in the question presented—those who have been charged with federal offenses, but who have been found incompetent to stand trial and committed to the Attorney General's custody—respondents repeat the court of appeals' inexplicable conclusion that the government somehow forfeited any argument that the statute could be constitutionally applied to respondent Catron. See Br. in Opp. 6-7; Pet. App. 19a n.10. But the government had neither reason nor need, in respondents' words, to "seek separate relief" (Br. in Opp. 6) for Catron in the Fourth Circuit. The government asked for exactly the relief that was appropriate in the circumstances, which was for the district court's invalidation of the statute to be reversed. Perhaps more important, in its briefing to the court of appeals, the government in fact dealt specifically with Catron's case. As explained in the petition

(Pet. 30), the government argued in a four-page section of its principal brief and again in its reply that Catron's certification was based on grounds distinct from those of the other four respondents, and that *Greenwood* v. *United States*, 350 U.S. 366 (1956), therefore applies differently to his case (as respondents agree) than to those of the other respondents.

C. The Court Of Appeals' Analysis Remains Difficult To Square With This Court's Decision In *Greenwood*

Respondents address the merits of the Fourth Circuit's constitutional analysis by asserting that, however "important" the question presented, it does not "conflict[]" with this Court's decisions but instead "embraces them." Br. in Opp. 7 (citing *Greenwood*, *supra*, and *United States* v. *Morrison*, 529 U.S. 598 (2000)). Their discussion of *Greenwood*, however, continues to be based on a distinction between those who have not yet been prosecuted and those who already have been convicted. *Id.* at 13-15. They thus conspicuously fail to explain why the proceedings against respondent Catron, who was not prosecuted, exceed Congress's authority. See Pet. 29-30. And even as to the other four respondents, their attempt to limit *Greenwood* to cases involving persons declared incompetent to stand trial (Br. in Opp. 15) implicitly concedes the government's argument (Pet. 24) that *Greenwood* did not purport to "place beyond Congress's power any ability to address * * * threats posed by other persons (like most of respondents here) who have not only been indicted but also convicted of federal crimes and imprisoned by the federal government."

Respondents otherwise address the constitutional issue by refuting arguments the government has not made. The government does not assert a general federal police power (Br. in Opp. 10-12), and does not claim that the Necessary and Proper Clause gives Congress powers that are not "tether[ed]" (*id.* at 8) to other powers vested in the federal government. But for matters that fall within Congress's enumerated powers, respondents do not deny that Congress has the authority under the Necessary and Proper Clause "to enact criminal laws, provide for the operation of a penal system, and assume for the United States custodial responsibilities for its prisoners." Pet. 18. And respondents fail to demonstrate why Congress cannot reasonably determine that in the case of a person who has become mentally ill and a danger to society, those custodial responsibilities include "provid[ing] for his supervision, treatment, and care—where the most relevant States decline to do so—rather than simply [releasing him] into society at large." Pet. 2-5, 20-22.

D. The Court Should Not Add A Due Process Question That Has Not Been Addressed By Any Court Of Appeals

1. Respondents "request" (Br. in Opp. 17) that, if the Court grants certiorari in this case, it also "order the parties to address whether the Due Process Clause mandates the application of the reasonable doubt standard to the factual determination required by [Section] 4248" concerning an individual's previous "sexually violent conduct or child molestation." The court of appeals did not reach that question. See Pet. App. 4a n.1. And respondents do not claim that their due process argument independently warrants certiorari at this time. They suggest only (Br. in Opp. 17) that this Court would foster "judicial economy" by deciding their due process challenge now. The due process issue, however, is en-

tirely separate from the question presented in the petition, and it has not yet been decided by *any* court of appeals. That alone should suffice to reject respondents' request.

As this Court recently explained, under its "usual procedures," it does not decide questions that have not already been answered by a court of appeals, because "[t]his Court * * * is one of final review, 'not of first view.'" *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). That is especially true with regard to constitutional questions. Thus, in *Fox Television*, the Court upheld certain FCC orders against a challenge under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, but, because the court of appeals had "not definitively rule[d] on the constitutionality of the Commission's orders," this Court refused the respondents' request that it "decide their validity under the First Amendment." 129 S. Ct. at 1819.[3] Although respondents mention that their due process challenge was "fully litigated in the district court" (Br. in Opp. 17), that consideration is insufficient to warrant exceptional treatment. See, *e.g.*, *Aschroft* v. *ACLU*, 535 U.S. 564, 585-586 (2002).

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[3] The posture of *Cutter* was even more analogous to this case. The court of appeals held that a federal statute violated the Establishment Clause. *Cutter*, 544 U.S. at 718 n.7. At the certiorari stage, the petitioners presented only an Establishment Clause question. Pet. at i, *Cutter*, *supra* (No. 03-9877), but the respondents argued that "the Court should review the other constitutional issues regarding [the statute's] validity, such as challenges under the Spending and Commerce Clauses and the Tenth and Eleventh Amendments," Br. in Opp. at 14. Although the parties briefed the additional constitutional questions at the merits stage in *Cutter*, see, *e.g.*, Pet. Br. at 36-49; U.S. Br. at 37-49; Resp. Br. at 25-33; U.S. Reply Br. at 14-20, this Court refused to consider those "defensive pleas" because they "were not addressed by the Court of Appeals." 544 U.S. at 718 n.7.

2. In any event, respondents' due process argument lacks merit. This Court previously has held that a civil-commitment framework predicated on clear and convincing evidence of mental illness and future dangerousness does not violate due process. See *Addington* v. *Texas*, 441 U.S. 418, 431-433 (1979). Section 4248 satisfies that standard by requiring the government to prove by clear and convincing evidence that an individual "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. 4247(a)(6). Respondents contend that Section 4248 violates due process because the *additional* showing it requires—that the individual "engaged or attempted to engage in sexually violent conduct or child molestation," 18 U.S.C. 4247(a)(5)—need not be proved beyond a reasonable doubt. But Congress's requirement in Section 4248 of a further showing, beyond what due process requires, to justify civil commitment, provides no reasonable basis for finding the provision unconstitutional. Here, Congress has increased the evidentiary burden on the government above the constitutionally mandated floor. In doing so, Congress need not demand that the government make its additional showing by the highest possible burden of proof.[4]

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[4] Even if respondents were correct on the merits of their due process argument, it would not provide an alternative ground for affirming the judgment of the court of appeals, because the proper remedy would not be invalidation of Section 4248 as a whole. If due process requires a higher burden of proof for certain facts than the "clear and convincing evidence" standard in Section 4248(d), the Court would need to deter-

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General

JUNE 2009

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mine whether that standard is severable from the rest of the statute. See, *e.g.*, *Ayotte* v. *Planned Parenthood*, 546 U.S. 320, 328-330 (2006). Assuming it is, the court of appeals' judgment—which affirmed the district court's grant of respondents' motions to dismiss, Pet. App. 21a, 94a—would need to be vacated so that the cases against respondents could proceed under a higher burden of proof.

JOINT
APPENDIX

Supreme Court, U.S.
FILED
AUG 2 8 2009
OFFICE OF THE CLERK

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No. 08-1224

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GRAYDON EARL COMSTOCK, JR., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: APR. 3, 2009

CERTIORARI GRANTED: JUNE 22, 2009

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION

No. 5:06-hc-02195-BR

UNITED STATES OF AMERICA, PETITIONER

v.

GRAYDON EARL COMSTOCK, JR., RESPONDENT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
11/02/2006	1	Motion to Determine Present Mental Condition of Imprisoned Person against Graydon Earl Comstock, Jr, filed by UNITED STATES OF AMERICA. (Attachments: # 1 Certification of a Sexually Dangerous Person # 2 Proposed Order) (Bredenberg, Michael) (Entered: 11/02/2006)
11/14/2006	2	Order appointing Federal Public Defender to represent respondent and appointing additional mental health examiner. Competency Hearing set for

DATE	DOCKET NUMBER	PROCEEDINGS
		3/5/2007 09:00 AM in Courtroom 2 before Judge W. Earl Britt. Signed by Judge W. Earl Britt on 11/14/06. (CHAM, ACP) (Entered: 11/14/2006)
		* * * * *
02/15/2007	12	MOTION to Dismiss *Petition for Hearing* by Graydon Earl Comstock, Jr. Responses due by 3/7/2007 (Pearce, Jane) (Entered: 02/15/2007)
		* * * * *
03/20/2007	19	MOTION to Dismiss *Petition* by Graydon Earl Comstock, Jr. Responses due by 4/9/2007 (Pearce, Jane) (Entered: 03/20/2007)
		* * * * *
04/05/2007	21	RESPONSE in Opposition re 19 MOTION to Dismiss *Petition*, 12 MOTION to Dismiss *Petition for Hearing* filed by UNITED STATES OF AMERICA. (Bredenberg, Michael) (Entered: 04/05/2007)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
04/13/2007	22	REPLY to Response to Motion re 19 MOTION to Dismiss *Petition*, 12 MOTION to Dismiss *Petition for Hearing* filed by Graydon Earl Comstock, Jr. (Pearce, Jane) (Entered: 04/13/2007)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
05/01/2007	25	NOTICE of Status Conference and Hearing on Motion 12 MOTION to Dismiss *Petition for Hearing*, 19 MOTION to Dismiss *Petition*: Motion Hearing set for 5/7/2007 10:30 AM in Raleigh – 7th Floor – Courtroom 2 before Judge W. Earl Britt. (Deputy Clerk – GM,) (Entered: 05/01/2007)
05/07/2007	26	Minute Entry for proceedings held before Judge W. Earl Britt: Status Conference held on 5/7/2007. (Court Reporter S Schwinn.) (Deputy Clerk – AEB,) (Entered: 05/07/2007)
05/15/2007	27	NOTICE by UNITED STATES OF AMERICA (Renfer, R.) (Entered: 05/15/2007)

DATE	DOCKET NUMBER	PROCEEDINGS
05/18/2007	28	TRANSCRIPT of Proceedings held on May 7. 2007 before Judge Judge Britt. Court Reporter: Stacy Schwinn. (Deputy Clerk – GM,) (Entered: 05/18/2007)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
09/07/2007	32	ORDER granting 12 Motion to Dismiss; granting 19 Motion to Dismiss; and the government's petitions are Dismissed and Temporarily stays the effect of this order pending receipt of, and the court's decision regarding, the government's forthcoming motion to stay the effective date of the release of the respondents from custody in each of the cases identified in the caption of this order. Signed by Judge W. Earl Britt on 9/7/2007. (Deputy Clerk – AI,) (Entered: 09/07/2007)
09/07/2007	33	CLERK'S JUDGMENT that this action is hereby dismissed. Signed by Clerk of Court on 9/7/2007. (Deputy Clerk – AI,) (Entered: 09/07/2007)

DATE	DOCKET NUMBER	PROCEEDINGS
09/19/2007	34	MOTION to Stay *Pending Appeal* by UNITED STATES OF AMERICA. (Renfer, R.) (Entered: 09/19/2007)
09/19/2007	35	Memorandum in Support re 34 MOTION to Stay *Pending Appeal* filed by UNITED STATES OF AMERICA. (Renfer, R.) (Entered: 09/19/2007)
10/04/2007	36	RESPONSE in Opposition re 34 MOTION to Stay *Pending Appeal* filed by Graydon Earl Comstock, Jr. (Pearce, Jane) (Entered: 10/04/2007)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
11/06/2007	37	NOTICE OF APPEAL by UNITED STATES OF AMERICA. (Renfer, R.) (Entered: 11/06/2007)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
11/26/2007	40	ORDER granting 34 Motion to Stay respondent's release pending appeal. Signed by Judge W. Earl Britt on

DATE	DOCKET NUMBER	PROCEEDINGS
		11/26/2007. (Deputy Clerk – GM,) (Entered: 11/26/2007)

* * * * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION

No. 5:06-hc-02202-BR

UNITED STATES OF AMERICA, PETITIONER

v.

SHANE CATRON, RESPONDENT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
11/13/2006	1	Motion to Determine Present Mental Condition of Imprisoned Person against Shane Catron, filed by UNITED STATES OF AMERICA. (Attachments: # 1 Certification of a Sexually Dangerous Person # 2 Proposed Order) (Bredenberg, Michael) (Entered: 11/13/2006)
11/14/2006	2	Order appointing Federal Public Defender to represent respondent and appointing additional mental health examiner.

DATE	DOCKET NUMBER	PROCEEDINGS
		Competency Hearing set for 1/9/2007 09:00 AM in Courtroom 2 before Judge W. Earl Britt. Signed by Judge W. Earl Britt on 11/14/06. (CHAM, ACP) (Entered: 11/14/2006)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
02/15/2007	9	MOTION to Dismiss *Petition for Hearing* by Shane Catron. Responses due by 3/7/2007 (Pearce, Jane) (Entered: 02/15/2007)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
03/20/2007	16	MOTION to Dismiss *Petition* by Shane Catron. Responses due by 4/9/2007 (Pearce, Jane) (Entered: 03/20/2007)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
04/05/2007	18	RESPONSE in Opposition re 9 MOTION to Dismiss *Petition for Hearing*, 16 MOTION to Dismiss *Petition* filed by UNITED STATES OF AMERICA. (Bredenberg, Michael) (Entered: 04/05/2007)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
04/13/2007	19	REPLY to Response to Motion re 9 MOTION to Dismiss *Petition for Hearing*, 16 MOTION to Dismiss *Petition* filed by Shane Catron. (Pearce, Jane) (Entered: 04/13/2007)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
05/01/2007	24	NOTICE of Status conference and Hearing on Motion 9 MOTION to Dismiss *Petition for Hearing*, 16 MOTION to Dismiss *Petition*: Motion Hearing set for 5/7/2007 10:30 AM in Raleigh – 7th Floor – Courtroom 2 before Judge W. Earl Britt. (Deputy Clerk – GM,) (Entered: 05/01/2007)
05/07/2007	25	Minute Entry for proceedings held before Judge W. Earl Britt: Status Conference held on 5/7/2007. (Court Reporter S. Schwinn.) (Deputy Clerk – AEB,) (Entered: 05/07/2007)
05/15/2007	26	NOTICE by UNITED STATES OF AMERICA (Renfer, R.) (Entered: 05/15/2007)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
05/22/2007		Annual Forensic Update received **SEALED DOCUMENT**. (Deputy Clerk – AEB) (Entered: 05/22/2007)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
09/07/2007	30	ORDER granting 9 Motion to Dismiss; granting 16 Motion to Dismiss; and the government's petitions are Dismissed and Temporarily stays the effect of this order pending receipt of, and the court's decision regarding, the government's forthcoming motion to stay the effective date of the release of the respondents from custody in each of the cases identified in the caption of this order. Signed by Judge W. Earl Britt on 9/7/2007. (Deputy Clerk – AI,) (Entered: 09/07/2007)
09/07/2007	31	CLERK'S JUDGMENT that this action is hereby dismissed. Signed by Clerk of Court on 9/7/2007. (Deputy Clerk – AI,) (Entered: 09/07/2007)
09/19/2007	32	MOTION to Stay *Pending Appeal* by UNITED STATES OF

DATE	DOCKET NUMBER	PROCEEDINGS
		AMERICA. (Renfer, R.) (Entered: 09/19/2007)
09/19/2007	33	Memorandum in Support re 32 MOTION to Stay *Pending Appeal* filed by UNITED STATES OF AMERICA.
10/04/2007	34	RESPONSE in Opposition re 32 MOTION to Stay *Pending Appeal* filed by Shane Catron. (Pearce, Jane) (Entered: 10/04/2007)
	* * * * *	
11/06/2007	35	NOTICE OF APPEAL as to 30 Order on Motion to Dismiss, by UNITED STATES OF AMERICA. (Renfer, R.) (Entered: 11/06/2007)
	* * * * *	
11/26/2007	38	ORDER granting 32 Motion to Stay respondent's release pending appeal. Signed by Judge W. Earl Britt on 11/26/2007. (Deputy Clerk - GM,) (Entered: 11/26/2007)

* * * * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION

No. 5:06-hc-02205-BR

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS MATHERLY, RESPONDENT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
11/22/2006	1	Certificate of Mental Disease or Defect and Dangerousness *Pursuant to 18 U.S.C. 4248* against Thomas Matherly, filed by UNITED STATES OF AMERICA. (Attachments: # 1 Certification # 2 Proposed Order) (Bredenberg, Michael) (Entered: 11/22/2006)
11/22/2006	2	Order appointing Federal Public Defender to represent respondent and appointing additional mental health examiner. Competency Hearing set for

DATE	DOCKET NUMBER	PROCEEDINGS
		5/7/2007 09:00 AM in Courtroom 2 before Judge W. Earl Britt. Signed by Judge W. Earl Britt on 11/22/06. (CHAM, ACP) (Entered: 11/22/2006)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
03/19/2007	10	MOTION to Dismiss *Petition for 18 USC 4248 Hearing* by Thomas Matherly. Responses due by 4/9/2007 (Pearce, Jane) (Entered: 03/19/2007)
03/20/2007	11	MOTION to Dismiss *Petition* by Thomas Matherly. Responses due by 4/9/2007 (Pearce, Jane) (Entered: 03/20/2007)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
04/05/2007	14	RESPONSE in Opposition re 11 MOTION to Dismiss *Petition*, 10 MOTION to Dismiss *Petition for 18 USC 4248 Hearing* filed by UNITED STATES OF AMERICA. (Bredenberg, Michael) (Entered: 04/05/2007)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
04/13/2007	15	REPLY to Response to Motion re 11 MOTION to Dismiss *Petition*, 10 MOTION to Dismiss *Petition for 18 USC 4248 Hearing* filed by Thomas Matherly. (Pearce, Jane) (Entered: 04/13/2007)
	* * * * *	
05/01/2007	18	NOTICE of Status conference and Hearing on Motion 11 MOTION to Dismiss *Petition*, 10 MOTION to Dismiss *Petition for 18 USC 4248 Hearing*: Motion Hearing set for 5/7/2007 10:30 AM in Raleigh – 7th Floor – Courtroom 2 before Judge W. Earl Britt. (Deputy Clerk – GM,)
05/07/2007	19	Minute Entry for proceedings held before Judge W. Earl Britt: Status Conference held on 5/7/2007. (Court Reporter S. Schwinn.) (Deputy Clerk – AEB,) (Entered: 05/07/2007)
05/15/2007	20	NOTICE by UNITED STATES OF AMERICA (Renfer, R.) (Entered: 05/15/2007)

DATE	DOCKET NUMBER	PROCEEDINGS

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
09/07/2007	24	ORDER granting 10 Motion to Dismiss; granting 11 Motion to Dismiss; and the government's petitions are Dismissed and Temporarily stays the effect of this order pending receipt of, and the court's decision regarding, the government's forthcoming motion to stay the effective date of the release of the respondents from custody in each of the cases identified in the caption of this order. Signed by Judge W. Earl Britt on 9/7/2007. (Deputy Clerk - AI,) (Entered: 09/07/2007)
09/07/2007	25	CLERK'S JUDGMENT that this action is hereby dismissed. Signed by Clerk of Court on 9/7/2007. (Deputy Clerk - AI,) (Entered: 09/07/2007)
09/19/2007	26	MOTION to Stay *Pending Appeal* by UNITED STATES OF AMERICA. (Renfer, R.) (Entered: 09/19/2007)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
09/19/2007	28	Memorandum in Support re 27 Memorandum in Support (*attached incorrect document previously*) filed by UNITED STATES OF AMERICA. (Renfer, R.) (Entered: 09/19/2007)
09/19/2007	29	MOTION to Stay *Pending Appeal* by UNITED STATES OF AMERICA. (Renfer, R.) (Entered: 09/19/2007)
10/04/2007	30	RESPONSE in Opposition re 29 MOTION to Stay *Pending Appeal* filed by Thomas Matherly. (Pearce, Jane) (Entered: 10/04/2007)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
11/06/2007	31	NOTICE OF APPEAL as to 24 Order on Motion to Dismiss, by UNITED STATES OF AMERICA. (Renfer, R.) (Entered: 11/06/2007)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
11/26/2007	34	ORDER granting 29 Motion to Stay respondent's release pending appeal. Signed by Judge W. Earl Britt on 11/26/2007.

DATE	DOCKET NUMBER	PROCEEDINGS
		(Deputy Clerk – GM,) (Entered: 11/26/2007)

* * * * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION

No. 5:06-hc-02206-BR

UNITED STATES OF AMERICA, PETITIONER

v.

MARVIN VIGIL, RESPONDENT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
11/22/2006	1	Certificate of Mental Disease or Defect and Dangerousness *pursuant to 18 U.S.C. 4248* against Marvin Vigil, filed by UNITED STATES OF AMERICA. (Attachments: # 1 Certification # 2 Proposed Order) (Bredenberg, Michael) (Entered: 11/22/2006)
11/22/2006	2	Order appointing Federal Public Defender to represent respondent and appointing additional mental health examiner. Competency Hearing set for

DATE	DOCKET NUMBER	PROCEEDINGS
		5/7/2007 09:00 AM in Courtroom 2 before Judge W. Earl Britt. Signed by Judge W. Earl Britt on 11/22/06. (CHAM, ACP) (Entered: 11/22/2006)
		* * * * *
02/21/2007		Annual Forensic Update received **SEALED DOCUMENT**. (Deputy Clerk – AEB,) (Entered: 02/21/2007)
		* * * * *
03/19/2007	10	MOTION to Dismiss *Petition for 18 USC 4248 Hearing* by Marvin Vigil. Responses due by 4/9/2007 (Pearce, Jane) (Entered: 03/19/2007)
03/20/2007	11	MOTION to Dismiss *Petition* by Marvin Vigil. Responses due by 4/9/2007 (Pearce, Jane) (Entered: 03/20/2007)
		* * * * *
04/05/2007	14	RESPONSE in Opposition re 10 MOTION to Dismiss *Petition for 18 USC 4248 Hearing*, 11 MOTION to Dismiss *petition* filed by UNITED

DATE	DOCKET NUMBER	PROCEEDINGS
		STATES OF AMERICA. (Bredenberg, Michael) (Entered: 04/05/2007)
	* * * * *	
04/13/2007	15	REPLY to Response to Motion re 10 MOTION to Dismiss *Petition for 18 USC 4248 Hearing*, 11 MOTION to Dismiss *Petition* filed by Marvin Vigil. (Pearce, Jane) (Entered: 04/13/2007)
	* * * * *	
05/01/2007	19	NOTICE of Status Conference and Hearing on Motion 11 MOTION to Dismiss *Petition*, 10 MOTION to Dismiss *Petition for 18 USC 4248 Hearing*: Motion Hearing set for 5/7/2007 10:30 AM in Raleigh – 7th Floor – Courtroom 2 before Judge W. Earl Britt. (Deputy Clerk – GM,) (Entered: 05/01/2007)
05/07/2007	20	Minute Entry for proceedings held before Judge W[illegible]arl Britt: Status Conference held on 5/7/2007. (Court Reporter

DATE	DOCKET NUMBER	PROCEEDINGS
		S. Schwinn.) (Deputy Clerk – AEB,) (Entered: 05/07/2007)
05/15/2007	21	NOTICE by UNITED STATES OF AMERICA (Renfer, R.) (Entered: 05/15/2007)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
09/07/2007	25	ORDER granting 10 Motion to Dismiss; granting 11 Motion to Dismiss; and the government's petitions are Dismissed and Temporarily stays the effect of this order pending receipt of, and the court's decision regarding, the government's forthcoming motion to stay the effective date of the release of the respondents from custody in each of the cases identified in the caption of this order. Signed by Judge W. Earl Britt on 9/7/2007. (Deputy Clerk – AI,) (Entered: 09/07/2007)
09/07/2007	26	CLERK'S JUDGMENT that this action is hereby dismissed. Signed by Clerk of Court on 9/7/2007. (Deputy Clerk – AI,) (Entered: 09/07/2007)

DATE	DOCKET NUMBER	PROCEEDINGS
09/19/2007	27	MOTION to Stay *Pending Appeal* by UNITED STATES OF AMERICA. (Renfer, R.) (Entered: 09/19/2007)
09/19/2007	28	Memorandum in Support re 27 MOTION to Stay *Pending Appeal* filed by UNITED STATES OF AMERICA. (Renfer, R.) (Entered: 09/19/2007)
10/04/2007	29	RESPONSE in Opposition re 27 MOTION to Stay *Pending Appeal* filed by Marvin Vigil. (Pearce, Jane) (Entered: 10/04/2007)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
11/06/2007	30	NOTICE OF APPEAL as to 25 Order on Motion to Dismiss, by UNITED STATES OF AMERICA. (Renfer, R.) (Entered: 11/06/2007)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
11/26/2007	33	ORDER granting 27 Motion to Stay respondent's release pending appeal. Signed by Judge W. Earl Britt on

DATE	DOCKET NUMBER	PROCEEDINGS
		11/26/2007. (Deputy Clerk - GM,) (Entered: 11/26/2007)

* * * * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION

No. 5:06-hc-02212-BR

UNITED STATES OF AMERICA, PETITIONER

v.

MARKIS REVLAND, RESPONDENT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
12/06/2006	1	Certificate of Mental Disease or Defect and Dangerousness *pursuant to 18 U.S.C. 4248* against Markis Revland, filed by UNITED STATES OF AMERICA. (Attachments: # 1 Certification) (Bredenberg, Michael) (Entered: 12/06/2006)
12/08/2006	2	Order appointing Federal Public Defender to represent respondent and appointing additional mental health examiner. Competency Hearing set for 5/7/2007 09:00 AM in Court-

DATE	DOCKET NUMBER	PROCEEDINGS
		room 2 before Judge W. Earl Britt. Signed by Judge W. Earl Britt on 12/8/06. (CHAM, ACP) (Entered: 12/08/2006)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
03/16/2007		Annual Forensic Update received **SEALED DOCUMENT**. (Deputy Clerk - AEB,) (Entered: 03/16/2007)
03/19/2007	10	MOTION to Dismiss *Petition for 18 USC 4248 Hearing* by Markis Revland. Responses due by 4/9/2007 (Pearce, Jane) (Entered: 03/19/2007)
03/20/2007	11	MOTION to Dismiss *Petition* by Markis Revland. Responses due by 4/9/2007 (Pearce, Jane) (Entered: 03/20/2007)
03/22/2007		Annual Forensic Update received **SEALED DOCUMENT**. (Deputy Clerk - AEB,) (Entered: 03/22/2007)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
04/05/2007	14	RESPONSE in Opposition re 10 MOTION to Dismiss *Petition for 18 USC 4248 Hearing,* 11 MOTION to Dismiss

DATE	DOCKET NUMBER	PROCEEDINGS
		Petition filed by UNITED STATES OF AMERICA. (Bredenberg, Michael) (Entered: 04/05/2007)
		* * * * *
04/13/2007	15	REPLY to Response to Motion re 10 MOTION to Dismiss *Petition for 18 USC 4248 Hearing*, 11 MOTION to Dismiss *Petition* filed by Markis Revland. (Pearce, Jane) (Entered: 04/13/2007)
		* * * * *
05/01/2007	21	NOTICE of Status Conference and Hearing on Motion 10 MOTION to Dismiss *Petition for 18 USC 4248 Hearing*, 11 MOTION to Dismiss *Petition*: Motion Hearing set for 5/7/2007 10:30 AM in Raleigh - 7th Floor - Courtroom 2 before Judge W. Earl Britt. (Deputy Clerk - GM,) (Entered: 05/01/2007)
05/07/2007	22	Minute Entry for proceedings held before Judge W. Earl Britt: Show Cause Hearing held on 5/7/2007. (Court Re-

DATE	DOCKET NUMBER	PROCEEDINGS
		porter S. Schwinn.) (Deputy Clerk – AEB,) (Entered: 05/07/2007)
05/15/2007	23	NOTICE by UNITED STATES OF AMERICA (Renfer, R.) (Entered: 05/15/2007)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
09/07/2007	27	ORDER granting 10 Motion to Dismiss; granting 11 Motion to Dismiss; and the government's petitions are Dismissed and Temporarily stays the effect of this order pending receipt of, and the court's decision regarding, the government's forthcoming motion to stay the effective date of the release of the respondents from custody in each of the cases identified in the caption of this order. Signed by Judge W. Earl Britt on 9/7/2007. (Deputy Clerk – AI,) (Entered: 09/07/2007)
09/07/2007	28	CLERK'S JUDGMENT that this action is hereby dismissed. Signed by Clerk of Court on 9/7/2007. (Deputy Clerk – AI,) (Entered: 09/07/2007)

DATE	DOCKET NUMBER	PROCEEDINGS
09/19/2007	29	MOTION to Stay *Pending Appeal* by UNITED STATES OF AMERICA. (Renfer, R.) (Entered: 09/19/2007)
09/19/2007	30	Memorandum in Support re 29 MOTION to Stay *Pending Appeal* filed by UNITED STATES OF AMERICA. (Renfer, R.) (Entered: 09/19/2007)
10/04/2007	31	RESPONSE in Opposition re 29 MOTION to Stay *Pending Appeal* filed by Markis Revland. (Pearce, Jane) (Entered: 10/04/2007)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
11/06/2007	32	NOTICE OF APPEAL as to 27 Order on Motion to Dismiss, by UNITED STATES OF AMERICA. (Renfer, R.) (Entered: 11/06/2007)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
11/26/2007	35	ORDER granting 29 Motion to Stay respondent's release pending appeal. Signed by Judge W. Earl Britt on

DATE	DOCKET NUMBER	PROCEEDINGS
		11/26/2007. (Deputy Clerk – GM,) (Entered: 11/26/2007)

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-7671

UNITED STATES OF AMERICA,
PETITIONER-APPELLANT

v.

GRAYDON EARL COMSTOCK, JR.,
RESPONDENT-APPELLEE

No. 07-7672

UNITED STATES OF AMERICA,
PETITIONER-APPELLANT

v.

SHANE CATRON,
RESPONDENT-APPELLEE

No. 07-7673

UNITED STATES OF AMERICA,
PETITIONER-APPELLANT

v.

THOMAS MATHERLY,
RESPONDENT-APPELLEE

No. 07-7674

UNITED STATES OF AMERICA,
PETITIONER-APPELLANT

v.

MARVIN VIGIL,
RESPONDENT-APPELLEE

No. 07-7675

UNITED STATES OF AMERICA,
PETITIONER-APPELLANT

v.

MARKIS REVLAND,
RESPONDENT-APPELLEE

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
11/29/2007	1	Case docketed. Originating case number: 5:06-hc-02195-BR. Case manager: SNagle. [07-7671] (SEN)
11/29/2007	3	Case docketed. Originating case number: 5:06-hc-02202-BR. Case manager: SNagle. [07-7672, 07-7671] (SEN)

DATE	DOCKET NUMBER	PROCEEDINGS
11/29/2007	4	Case docketed. Originating case number: 5:06-hc-2205-BR. Case manager: SNagle. [07-7673, 07-7671, 07-7672] (SEN)
11/29/2007	7	Case docketed. Originating case number: 5:06-hc-02206-BR. Case manager: SNagle. [07-7674, 07-7671, 07-7672, 07-7673] (SEN)
11/29/2007	9	Case docketed. Originating case number: 5:06-hc-02212-BR. Case manager: SNagle. [07-7675, 07-7671, 07-7672, 07-7673, 07-7674] (SEN)
11/29/2007	11	ORDER filed [997765660] consolidating case 07-7672, 07-7673, 07-7674, 07-7675 with 07-7671(L). Copies to all parties. [07-7671, 07-7672, 07-7673, 07-7674, 07-7675] (SEN)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
11/29/2007	14	ORDER filed [997765776] appointing/assigning counsel. Jane Ely Pearce in 07-7671

DATE	DOCKET NUMBER	PROCEEDINGS
		for Comstock, Graydon Earl Jr. in 07-7671 Nunc Pro Tunc Date: 11/06/2007. Copies to all parties. [07-7671, 07-7672, 07-7673, 07-7674, 07-7675] (SEN)
		* * * * *
01/22/2008	23	OPENING BRIEF (PAPER) file-stamped, on behalf of. Number of pages: [60]. Entered on Docket Date: 02/04/2008. [997799174] [07-7671, 07-7672, 07-7673, 07-7674, 07-7675] (SEN)
01/22/2008	24	ADDENDUM to brief file-stamped on behalf of US in 07-7671. Number of pages: [23]. Entered on docket date: 02/04/2008. [997799176] [07-7671, 07-7672, 07-7673, 07-7674, 07-7675] (SEN)
01/22/2008	25	APPENDIX (PAPER) file-stamped, on behalf of US in 07-7671. Total number of volumes (including any sealed):. Total number of pages in all volumes: 311. Entered on Docket Date: 02/04/2008.

DATE	DOCKET NUMBER	PROCEEDINGS
		[997799179] [07-7671, 07-7672, 07-7673, 07-7674, 07-7675] (SEN)

* * * * *

03/06/2008	29	RESPONSE BRIEF (PAPER) file-stamped, on behalf of Graydon Earl Comstock, Jr. in 07-7671, Shane Catron in 07-7672, Thomas Matherly in 07-7673, Marvin Vigil in 07-7674, Markis Revland in 07-7675. Number of pages: [103]. Entered on Docket Date: 03/12/2008. [997822429] [07-7671, 07-7672, 07-7673, 07-7674, 07-7675] (SEN)
03/24/2008	30	REPLY BRIEF (PAPER) file-stamped, on behalf of US in 07-7671, 07-7672, 07-7673, 07-7674, 07-7675. Number of pages: [38]. Entered on Docket Date: 03/26/2008. [997829318] [07-7671, 07-7672, 07-7673, 07-7674, 07-7675] (DHB)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
09/23/2008	40	ORAL ARGUMENT heard before the Honorable DIANA GRIBBON MOTZ, G. STEVEN AGEE and JAMES C. CACHERIS. Attorneys arguing case: Mr. Mark Bernard Stern for Appellant US and Ms. Jane Ely Pearce for Appellee Shane Catron in 07-7672. Courtroom Deputy: Jackie Quella. [997941573] [07-7671, 07-7672, 07-7673, 07-7674, 07-7675] (JJQ)
		* * * * *
01/08/2009	43	PUBLISHED AUTHORED OPINION filed. Originating case number: 5:06-hc-02195-BR Copies to all parties and the district court/agency. [998008809] [07-7671, 07-7672, 07-7673, 07-7674, 07-7675] (SEN)
01/08/2009	44	JUDGMENT ORDER filed. Decision: affirmed. Originating case number: 5:06-hc-02195-BR. Entered on Docket Date: 01/08/2009. [998008823] Copies to all par-

DATE	DOCKET NUMBER	PROCEEDINGS
		ties and the district court/agency. [07-7671, 07-7672, 07-7673, 07-7674, 07-7675] (SEN)
		* * * * *
02/23/2009	47	PETITION for rehearing and rehearing en banc filed by US in 07-7671, 07-7673, 07-7674, 07-7675. [07-7671, 07-7672, 07-7673, 07-7674, 07-7675] (SLC)
02/23/2009	48	Mandate stayed by FRAP 41(d)(1). [07-7671, 07-7672, 07-7673, 07-7674, 07-7675] (SEN)
03/10/2009	49	COURT ORDER filed [998050740] denying MOTION for rehearing en banc [9980399302]; Copies to all parties [07-7671, 07-7672, 07-7673, 07-7674, 07-7675] (SEN)
03/13/2009	50	MOTION filed by Appellant US in 07-7671, 07-7672, 07-7673, 07-7674, 07-7675 to stay mandate [FRAP 41(d)]. [998054311] [07-7671, 07-7672, 07-7673, 07-7674, 07-7675] (SLC)

DATE	DOCKET NUMBER	PROCEEDINGS
03/16/2009	51	RESPONSE/ANSWER filed by Graydon Earl Comstock, Jr. in 07-767, Shane Catron in 07-7672, Thomas Matherly in 07-7673, Marvin Vigil in 07-7674, Markis Revland in 07-7675 to Motion to stay mandate [FRAP 41(d)] [998054311-2]. Nature of response: in opposition. [07-7671, 07-7672, 07-7673, 07-7674, 07-7675] (JEP)
03/17/2009	52	Mandate stayed by FRAP 41(d). [07-7671. 07-7672, 07-7673, 07-7674, 07-7675] (SEN)
03/24/2009	53	COURT ORDER filed [998061348] Copies to all parties. [07-7671. 07-7672, 07-7673, 07-7674, 07-7675] (SEN)
03/24/2009	54	Mandate stayed by FRAP 41(d)(1) – see court order of 3/24/09. [07-7671. 07-7672, 07-7673, 07-7674, 07-7675] (SEN)

* * * * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION

No. 5:06-hc-02195-BR

UNITED STATES OF AMERICA, PETITIONER

v.

GRAYDON EARL COMSTOCK, JR.,
Register Number 09056-031, RESPONDENT

Nov. 2, 2006

CERTIFICATION OF A SEXUALLY DANGEROUS PERSON

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby submits the attached Certification of a Sexually Dangerous Person pursuant to Title 18 U.S.C. § 4248(a).

Respectfully submitted, this 2nd day of November, 2006.

George E. B. Holding
United States Attorney

BY: /s/MICHAEL BREDENBERG
MICHAEL BREDENBERG
Special Assistant U.S. Attorney
Civil Division
310 New Bern Avenue
Suite 800, Federal Building
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N.C. Bar # 26068

CERTIFICATION OF A SEXUALLY DANGEROUS PERSON

(1) I, William T. Bickart, am Interim Chairperson of the Federal Bureau of Prisons (Bureau) Certification Review Panel, Washington, D.C. Pursuant to 28 C.F.R. § 0.97, the Director of the Bureau has delegated to me the authority to certify persons in Bureau custody as sexually dangerous, as authorized by 18 U.S.C. § 4248(a).

(2) Inmate Graydon Earl Comstock, Jr., Register Number 9056-031, is currently in Bureau custody at the Federal Correctional Institution in Butner, North Carolina, in service of a 37-month term of imprisonment. Inmate Comstock's projected release date is November 8, 2006, via Good Conduct Time release.

(3) Based on a review of inmate Comstock's Bureau records, I certify he is a sexually dangerous person as defined by 18 U.S.C. § 4247(a)(5), and sexually dangerous to others as defined by 18 U.S.C. § 4247(a)(6).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

/s/ WILLIAM T. BICKART — 11/1/06
WILLIAM T. BICKART — Date
Interim Chairperson
Certification Review Panel
Federal Bureau of Prisons

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION

No. 5:06-hc-02202-BR

UNITED STATES OF AMERICA, PETITIONER

v.

SHANE CATRON,
Register Number 82262-008, RESPONDENT

Nov. 13, 2006

CERTIFICATION OF A SEXUALLY DANGEROUS PERSON

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby submits the attached Certification of a Sexually Dangerous Person pursuant to Title 18 U.S.C. § 4248(a).

The United States previously filed a Certificate of Mental Disease or Defect and Dangerousness, with regard to the Respondent, pursuant to Title 18 U.S.C. § 4246. However, as the government believes the recently enacted 18 U.S.C. § 4248 is the more applicable statute to Respondent's case, the United States intends to withdraw the 18 U.S.C. § 4246 certificate and proceed with this filing.

Submitted to the court under separate cover are two forensic evaluations prepared in connection with the previous filing pursuant to 18 U.S.C. § 4246. Prior to the hearing in this case, the United States intends to file a supplemental forensic report addressing the specific issues of this case.

Respectfully submitted, this 13th day of November, 2006.

George E. B. Holding
United States Attorney

BY: /s/MICHAEL BREDENBERG
MICHAEL BREDENBERG
Special Assistant U.S. Attorney
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N.C. Bar # 26068

CERTIFICATION OF A SEXUALLY DANGEROUS PERSON

(1) I, William T. Bickart, am Interim Chairperson of the Federal Bureau of Prisons (Bureau) Certification Review Panel, Washington, D.C. Pursuant to 28 C.F.R. § 0.97, the Director of the Bureau has delegated to me the authority to certify persons in Bureau custody as sexually dangerous, as authorized by 18 U.S.C. § 4248(a).

(2) Inmate Shane Catron, Register Number 822-008, is in Bureau custody at the Federal Medical Center in Butner, North Carolina. Inmate Catron has been found incompetent to stand trial pursuant to 18 U.S.C. § 4241(d), and as such is subject to the provisions of 18 U.S.C. § 4248.

(3) Based on a review of inmate Catron's Bureau records, I certify he is a sexually dangerous person as defined by 18 U.S.C. § 4247(a)(5), and sexually dangerous to others as defined by 18 U.S.C. § 4247(a)(6).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

/s/ WILLIAM T. BICKART 11/8/06
WILLIAM T. BICKART Date
Interim Chairperson
Certification Review Panel
Federal Bureau of Prisons

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION

No. 5:06-hc-02205-BR

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS MATHERLY,
Register Number 34209-037, RESPONDENT

Nov. 22, 2006

CERTIFICATION OF A SEXUALLY DANGEROUS PERSON

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby submits the attached Certification of a Sexually Dangerous Person pursuant to Title 18 U.S.C. § 4248(a).

Respectfully submitted, this 22nd day of November, 2006.

George E. B. Holding
United States Attorney

BY: /s/MICHAEL BREDENBERG
MICHAEL BREDENBERG
Special Assistant U.S. Attorney
Civil Division
310 New Bern Avenue
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(919) 856-4309
FAX: (919) 856-4821
N.C. Bar # 26068

CERTIFICATION OF A SEXUALLY DANGEROUS PERSON

(1) I, William T. Bickart, am Interim Chairperson of the Federal Bureau of Prisons (Bureau) Certification Review Panel, Washington, D.C. Pursuant to 28 C.F.R. § 0.97, the Director of the Bureau has delegated to me the authority to certify persons in Bureau custody as sexually dangerous, as authorized by 18 U.S.C. § 4248(a).

(2) Bureau records reflect the following. Inmate Thomas Matherly, Register Number 34209-037, is in Bureau custody at the Federal Correctional Institution Butner, North Carolina in service of a 41 month federal term of imprisonment. Inmate Matherly's projected release date is November 23, 2006, via Good Conduct Time release.

(3) Based on a review of inmate Matherly's Bureau records, I certify he is a sexually dangerous person as defined by 18 U.S.C. § 4247(a)(5), and sexually dangerous to others as defined by 18 U.S.C. § 4247(a)(6).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

/s/ WILLIAM T. BICKART 11/21/06
WILLIAM T. BICKART Date
Interim Chairperson
Certification Review Panel
Federal Bureau of Prisons

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION

No. 5:06-hc-02206-BR

UNITED STATES OF AMERICA, PETITIONER

v.

MARVIN VIGIL,
Register Number 06157-051, RESPONDENT

Nov. 22, 2006

CERTIFICATION OF A SEXUALLY DANGEROUS PERSON

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby submits the attached Certification of a Sexually Dangerous Person pursuant to Title 18 U.S.C. § 4248(a).

For the purposes of this case, the United States requests, that pursuant to 18 U.S.C. § 4248(b), in addition to ordering an independent evaluation, the Court order the government to conduct a psychiatric or psychological evaluation pursuant to the provisions of 18 U.S.C. §§ 4247(b) and (c). In support of this request, the United States submits that Respondent has not been cooperative with the Bureau of Prisons efforts to interview him. Accordingly, in order to provide the Court with as much information as possible, the government requests a court ordered evaluation.

Respectfully submitted, this 22nd day of November, 2006.

George E. B. Holding
United States Attorney

BY: /s/MICHAEL BREDENBERG
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Special Assistant U.S. Attorney
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CERTIFICATION OF A SEXUALLY DANGEROUS PERSON

(1) I, William T. Bickart, am Interim Chairperson of the Federal Bureau of Prisons (Bureau) Certification Review Panel, Washington, D.C. Pursuant to 28 C.F.R. § 0.97, the Director of the Bureau has delegated to me the authority to certify persons in Bureau custody as sexually dangerous, as authorized by 18 U.S.C. § 4248(a).

(2) Bureau records reflect the following. Inmate Marvin Vigil, Register Number 06157-051, is in Bureau custody at the Federal Correctional Complex, Butner, North Carolina, in service of a 96 month federal term of imprisonment. Inmate Vigil's projected release date is November 22, 2006, via Good Conduct Time release.

(3) Based on a review of inmate Vigil's Bureau records, I certify he is a sexually dangerous person as defined by 18 U.S.C. § 4247(a)(5), and sexually dangerous to others as defined by 18 U.S.C. § 4247(a)(6).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

/s/ WILLIAM T. BICKART — 11/22/06
WILLIAM T. BICKART — Date
Interim Chairperson
Certification Review Panel
Federal Bureau of Prisons

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION

No. 5:06-hc-02212-BR

UNITED STATES OF AMERICA, PETITIONER

v.

MARKIS REVLAND,
Register Number 02431-029, RESPONDENT

Dec. 6, 2006

CERTIFICATION OF A SEXUALLY DANGEROUS PERSON

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina hereby submits the attached Certification of a Sexually Dangerous Person pursuant to Title 18 U.S.C. § 4248(a).

Respectfully submitted, this 6th day of December, 2006.

George E. B. Holding
United States Attorney

BY: /s/MICHAEL BREDENBERG
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FAX: (919) 856-4821
N.C. Bar # 26068

CERTIFICATION OF A SEXUALLY DANGEROUS PERSON

(1) I, Paul Sahwell, am Interim Chairperson of the Federal Bureau of Prisons (Bureau) Certification Review Panel, Washington, D.C. Pursuant to 28 C.F.R. § 0.97, the Director of the Bureau has delegated to me the authority to certify persons in Bureau custody as sexually dangerous, as authorized by 18 U.S.C. § 4248(a).

(2) Bureau records reflect the following. Inmate Markis Revland, Register Number 02431-029, is in Bureau custody at the Federal Correctional Institution, Butner, North Carolina, in service of a 60 month federal term of imprisonment. Inmate Revland's projected release date is January 4, 2007, via Good Conduct Time release.

(3) Based on a review of inmate Revland's Bureau records, I certify he is a sexually dangerous person as defined by 18 U.S.C. § 4247(a)(5), and sexually dangerous to others as defined by 18 U.S.C. § 4247(a)(6).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

/s/ PAUL SAHWELL 11/14/06
PAUL SAHWELL Date
Interim Chairperson
Certification Review Panel
Federal Bureau of Prisons

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-7671 (L)
(5:06-hc-02195-BR)

UNITED STATES OF AMERICA, PETITIONER-APPELLANT

v.

GRAYDON EARL COMSTOCK, JR.,
RESPONDENT-APPELLEE

No. 07-7672

UNITED STATES OF AMERICA, PETITIONER-APPELLANT

v.

SHANE CATRON, RESPONDENT-APPELLEE

No. 07-7673

UNITED STATES OF AMERICA, PETITIONER-APPELLANT

v.

THOMAS MATHERLY, RESPONDENT-APPELLEE

No. 07-7674

UNITED STATES OF AMERICA, PETITIONER-APPELLANT

v.

MARVIN VIGIL, RESPONDENT-APPELLEE

No. 07-7675

UNITED STATES OF AMERICA, PETITIONER-APPELLANT

v.

MARKIS REVLAND, RESPONDENT-APPELLEE

ORDER

The Court consolidates Case Nos. 07-7672, 07-7673, 07-7674, 07-7675 with Case No. 07-7671. The lead case number, 07-7671, shall be included on all papers subsequently filed in this Court. Entry of appearance forms and disclosure statements filed by counsel and parties to the lead case are deemed filed in the secondary case.

For the Court - By Direction

/s/ Patricia S. Connor, Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-7671

UNITED STATES OF AMERICA,
PETITIONER-APPELLANT

v.

GRAYDON COMSTOCK, JR., THOMAS MATHERLY,
MARVIN VIGIL, MARKIS REVLAND, AND
SHANE CATRON, RESPONDENTS-APPELLEES

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE APPELLANT

* * * * *

ARGUMENT

I. CONGRESS ACTED WITHIN ITS AUTHORITY IN AUTHORIZING CIVIL COMMITMENT FOR CERTAIN DANGEROUS PERSONS IN FEDERAL CUSTODY WHO HAVE BEEN CHARGED WITH OR CONVICTED OF FEDERAL CRIMES.

* * * * *

E. Section 4248 Is A Constitutional Exercise Of The Government's Unexhausted Power To Prosecute Individuals, Like Respondent Catron, Found Incompetent To Stand Trial And Committed To Federal Custody Under § 4241(d).

1. Respondent Catron was found incompetent to stand trial and therefore committed to federal custody under § 4241(d). (As discussed, the other four respondents were convicted of federal crimes and were incarcerated at the time the government filed certificates under the Adam Walsh Act.) Catron's situation substantially parallels that addressed by the Supreme Court in *Greenwood* v. *United States*, 350 U.S. 366 (1956), and the district court's efforts to distinguish the present case only underscore the error of its reasoning. *See* [*United States* v.] *Shields*, [No. 07-12056,] 2007 WL 3326803, at *3-4 [(D. Mass. 2007)] (concluding that *Greenwood* is dispositive of the constitutionality of §4248 as applied to respondents like Catron who have been found incompetent to stand trial under § 4241); *United States* v. *Dowell*, No. 06-1216 (W.D. Okla. 2007).(same).

Like Catron, the accused in *Greenwood* (who was alleged to have robbed a post office and assaulted an employee) had been deemed incompetent to stand trial. As it then existed, the pretrial commitment provision rested on a showing that the person would "probably endanger the officers, property, or other interests of the United States."[18] The Court upheld Congress's power to authorize a civil commitment pending trial, even though the commitment would be indefinite and the prospect of a trial, in light of Greenwood's unpromising condition, might be illusory. The Court concluded that the government's power to prosecute had not been "irretrievably frustrated," and that the authority to commit Greenwood was auxiliary to its unexhausted power to prosecute. *Greenwood*, 350 U.S. at 375.

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[18] That statutory language has since been amended to require that the person's release would "create a substantial risk of bodily injury to another person or serious damage to property of another." 18 U.S.C. § 4246.

Each of the factors considered significant in *Greenwood* is present in the case of an individual committed under § 4248 in these circumstances—the pending federal charge, finding of incompetency, lawful placement in federal custody, and determination of dangerousness. As the district court acknowledged, "to the extent that there is an indictment pending against an individual like Catron, the power to prosecute is not exhausted, and the Supreme Court has held that Congress has the power to authorize civil [*sic*] where release would endanger the interests of the United States." D. Ct. Op. at 14 (JA 255).

The district court nevertheless held § 4248 facially invalid. Under the district court's view, the federal government's authority to initiate civil commitment proceedings exists only when the accused would be likely to injure "the interests of the United States" as narrowly construed to encompass only direct injury, such as physical damage to federal property. D. Ct. Op. at 14 n.7 (JA 255).

The Supreme Court in *Greenwood* did not adopt a similarly narrow analysis. As discussed, the concern animating the provision addressed in *Greenwood*, like other [*sic*] the other civil commitment provisions enacted by the 81st Congress, was the release of a person who, due to mental condition, would "'constitute a menace to public safety,'" H.R. Rep. No. 1319 [81st Cong., 1st Sess.] at 2, 1949 U.S.C.C.A.N. at 1929 (quoting Bennett). Citing the Judicial Conference Report of 1945, the Supreme Court thus recognized that the purpose of the provision at issue was to avoid jeopardizing the public by release of a dangerous inmate. *Greenwood*, 350 U.S. at 373-74.

Indeed, the district court's reading is directly at odds with this Court's decision in *United States* v. *Curry*, 410 F.2d 1372 (4th Cir. 1969), which interpreted the provision at issue in *Greenwood*. In remanding to the district court, this Court directed that the court should determine whether the prisoner's "release would endanger the safety of persons, property or the public interest in general—not merely the interests peculiar to the United States as such." *Id.* at 1374 (quoting *Royal* v. *United States*, 274 F.2d 846, 851-52 (10th Cir. 1960) (rejecting attempt to impose a narrow construction)).

Moreover, there is no indication in *Greenwood* that the petitioner posed a meaningful risk to federal instrumentalities. To the contrary, the opinion quotes a report by the Board of Examiners of the government medical facility as concluding that the petitioner did not have a specific desire to harm officials of the United States and "probably would not constitute a danger to the safety of officers, property, or other interests of the United States." *Greenwood*, 350 U.S. at 371. The quoted report suggested that, if anything, the petitioner "might persist in engaging in criminal activities similar to those with which he [had been] charged"—i.e., armed robberies. *Id.* The Court did not express concern that any future robberies by the petitioner would likely constitute state crimes; no evidence of a particular predilection to violate federal law was required. *See also United States* v. *Salerno*, 481 U.S. 739, 747 (1987) (emphasizing the legitimacy of the government's interest in "preventing danger to the community" as a basis for pretrial incarceration); *id.* at 759 n.4 (Marshall, J., dissenting) (noting that neither the statute nor the majority's opinion required any evidence that a detainee's dangerousness was based on "the likelihood that [he] poses a danger to others through the commission of *federal* crimes" (emphasis in original)).

2. While *Greenwood*'s reasoning was premised upon the government's (largely theoretical) power of prosecution with regard to a pre-trial detainees [*sic*] such as Catron, the federal government notably also continues to exercise authority with respect to the other four respondents, who are subject to a period of supervised release following their release from custody. Violation of the terms of their release can result in their return to prison. *See* 18 U.S.C. § 3583 (authorizing revocation of supervised and reimprisonment based on violations of release conditions); *Pa. Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 365 (1998); *United States* v. *Reynard*, 473 F.3d 1008, 1021-22 (9th Cir. 2007) (explaining that the federal power to mandate conditions of supervised release "arises when the individual commits a federal crime"). Accordingly, the federal government's authority and power to prosecute these respondents, like its power with respect to respondent Catron, has not been exhausted. *See* [*United States* v.] *Carta*[, 503 F. Supp. 2d 405 (D. Mass. 2007)] ("where the Respondents are . . . in lawful custody of the Government, the power described in *Greenwood* applies").

More fundamentally, the district court's reading of *Greenwood* reflects its general refusal to recognize that the federal interests incident to the operation of the criminal justice and penal systems encompass a duty to the persons who may be injured by the release of a dangerous person. That refusal underlies the several analytical errors that mistakenly caused it to invalidate a wholly proper exercise of congressional authority.

* * * * *

Judicial Conference, Report of the Committee to Study Treatment Accorded by Federal Courts to Insane Persons Charged with Crime (1945)

REPORT OF COMMITTEE TO STUDY TREATMENT ACCORDED BY FEDERAL COURTS TO INSANE PERSONS CHARGED WITH CRIME

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE MEMBERS OF THE CONFERENCE OF SENIOR CIRCUIT JUDGES:

At the meeting of the Judicial Conference in September, 1942, the Chief Justice was authorized "to appoint a committee to study, in cooperation with the Attorney General, the treatment accorded by the federal courts to insane persons charged with crime." Two of the member of the original committee so appointed have since died, Chief Justice Eicher and Judge Otis. To fill their places, the Chief Justice appointed the Honorable Bolitha J. Laws, Chief Justice of the District Court of the United States for the District of Columbia, and the Honorable Carroll C. Hincks, United States District Judge for the District of Connecticut. Judge Wilbur, having recently retired as Circuit Judge, has withdrawn from active service on the committee, but has continued to keep in touch with its work and to offer suggestions.

At the meeting of the Judicial Conference in September, 1943, the chairman reported informally on the work of the committee and on some of the problems which it had encountered. The Conference directed that the committee be continued.

An interim report by the committee was made to the Judicial Conference at its meeting in September, 1944. In that report the committee called attention to a survey by the Director of the Bureau of Prisons indicating that a disturbing number of persons are being sentenced for federal offenses and sent to prison who, because of insanity, should not have been convicted, and who, indeed, because of their mental incapacity to participate rationally in their defense, should never have been arraigned or brought to trial. Pursuant to the committee's recommendation, the Conference adopted a resolution in the following terms:

"Resolved, that the Conference recommend:

> (1) That the district courts make fuller use of the sum provided in the annual appropriation for psychiatric examinations in occasional criminal cases at the instance to the court, for the purpose of procuring a competent and impartial psychiatric examination of accused persons brought before the court, where from the report of the probation officer or from other indications there is reason to believe that the accused may be mentally unsound;
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> (2) That wherever possible, arrangements should be made with suitable local hospitals and other institutions and agencies whereby in the discretion of the district courts persons charged with crime may be sent temporarily to such institutions for observation and examination as to their mental condition, as is now done in some districts; and further that the Administrative Office be requested to survey the possibilities of this procedure in the various districts, and if agreeable to the respective district courts to arrange with the officials of local institutions for the

use of their facilities for the examination of the mental soundness of persons charged with crime; that for this purpose the Administrative Office be authorized to use the services of the probation officers of the various districts."

The committee was further continued and was instructed to study in particular the following matters:

> "(1) psychiatric examinations as a matter of course in a class of cases, to be determined, in which the offenders are most apt to be insane; (2) a procedure in other cases for determining before trial the sanity of an accused person; and (3) the protection of courts from insane litigants and a suitable procedure for dealing with such persons."

The Director of the Administrative Office reports that he is proceeding with the survey which he was requested to make by the 1944 resolution of the Conference. Summarizing the various replies which have been received from the districts to date, the Chief of Probation states:

> "Most of them are to the effect that psychiatric examinations can be had when the need arises. A few of the reports indicate very little if any facilities are available for hospitalization and observation. In general, however, the reports indicate fairly adequate facilities are available for both examination without hospitalization, as well as examination with hospitalization.
>
> The rates quoted for examination range from $15 to $25. Hospitalization rates vary considerably from a minimum charge in hospitals to perhaps $8 a day average in private hospitals."

The federal statutes prescribe no procedure for determining an accused's mental competence to stand trial. Where such incompetence exists, a conviction is void and presumably is open to attack on habeas corpus. See *Ashley* v. *Pescor*, 147 F.(2d) 318 (C.C.A. 8th, 1945); *Youtsey* v. *United States*, 97 Fed. 937 (C.C.A. 6th, 1899). But see *McMahan* v. *Hunter* (C.C.A. 10th, July 21, 1945). It is desirable that a definite procedure be established for raising the question as to the competence of an accused to stand trial and for determination of such issue. The courts have, in the past, dealt with the problem in various ways.

In the leading case of *Youtsey* v. *United States*, 97 Fed. 937 (C.C.A. 6th, 1899), the court said that if it appear after arraignment, and before trial, that the prisoner is probably not capable of making a rational defense, the proceedings should stop until the sanity of the prisoner is determined or restored. "Such an issue, when presented, goes to the fundamental right of the Court to try the main issue, 'Not guilty.'" Such preliminary question as to the accused's mental competence may be determined in such manner as the trial judge deems proper; "it was optional with the court to call a jury, or to resort to any other special mode of aiding his judgment". If the issue as to present insanity is not raised until the trial has begun, "the court may submit the objection to the jury along with the principal issue, requiring a special verdict as to the competency of the defendant to understand the proceeding and intelligently defend himself. But, if the jury find insanity to exist, a verdict upon the issue of not guilty should be quashed."

In *United States* v. *Harriman*, 4 F. Supp. 186 (S.D.N.Y., 1933), where the question of defendant's mental incompetence was raised before the trial had begun, the trial judge considered that he had discretion to determine this issue in one of three ways: (1) to commit the defendant to an institution for observation and report, (2) to call in the assistance of a jury for an advisory finding, and (3) to conduct the inquiry by himself alone. He found no statutory authority and no federal precedent for following the procedure available in some states, namely, the appointment of a commission to make inquiry and report. "Even if, however, there were inquiry by a commission, its report would only be advisory. There would still remain the responsibility for an examination by the court itself." In this case the judge decided not to submit the issue to a jury, but to hear himself whatever testimony, lay or expert, the defense and prosecution wished to offer; after which he reserved a free hand "to do what in my unfettered choice I deem required in order to reach a just judgment," including the possibility of committing the accused to an institution for observation and report.

In *United States* v. *Chisholm*, 149 Fed. 284 (C.C.S.D. Ala, 1906), after the trial had proceeded for some days, counsel for the defendant suggested that the prisoner was mentally incompetent to assist in his defense. The judge, recognizing that it was within his own discretion how to determine the issue thus raised, submitted it to the jury. He explained to the jury that a person "though not entirely sane, may be put upon trial in a criminal case if he rightly comprehends his own condition with reference to the proceedings, and has such possession and control of his mental powers, including the faculty of memory, as will enable him to testify intelligently and give his counsel all the material facts bearing upon the criminal act charged against him and material to repel the criminating evidence, and has such poise of his faculties as will enable him to rationally and properly exercise all the rights which the law gives him in contesting a conviction." He instructed the jury that the form of its verdict would be: "We, the jury, find the prisoner at the bar is, or is not (according to the view you take of the evidence), of sufficiently sane mind and in such possession of his mental faculties as make it proper to hold him on trial."

In *United States* v. *Haupt*, a recent case in the Northern District of Illinois, where a question was raised as to the mental competence of the accused to understand the nature of the proceedings against him and rationally to advise with counsel as to his defense, Judge Barnes determined this issue in the following way: By order he appointed four physicians to constitute a board of inquiry into the present mental condition of the defendant. The hospital records of the North Shore Sanitarium and of the Cook County Jail Hospital were made available to such board. Additional data might be submitted to the board by consent of the parties. The board was authorized to examine the defendant at the jail, or if the board deemed it desirable arrangements would be made to remove the defendant to the Psychopathic Hospital or the Marine Hospital for a period of observation. Each of the four physicians constituting the board was directed to file a written report with the court and to be prepared to testify at a subsequent hearing before a jury on the issue of defendant's present sanity. The court further ordered that the following issue of fact be made and tried by a jury, to wit: "Does the defendant, Hans Max Haupt, understand the proceedings against him and is he able rationally to advise with his counsel as to his defense?" The jury impaneled to try this issue heard the testimony of the four psychiatrists and their several reports made to the judge, and in addition heard evidence presented by both the prosecution and defense; after which the jury reported a finding in the affirmative on the issue presented. Thereafter the court entered an order which, after reciting the above proceedings, concluded:

> "It is, therefore, the finding of this court that the verdict of the jury in the above entitled cause is well warranted by the evidence, and that the said Hans Max Haupt is mentally capable of intelligently understanding the nature of the proceedings against him, and that he is capable of advising rationally with his counsel as to his defense".

The defendant was therefore ordered to be arraigned immediately and to plead the indictment.

As appears from the foregoing, some district courts have followed the practice of impaneling a jury to try the preliminary issue as to the accused's competence to stand trial. There is no constitutional requirement for reference of such issue to a jury, and its finding, it seems to be agreed, is advisory only. The final determination is the responsibility of the court. It may be questioned whether an advisory finding by a jury on such issue is a desirable procedure.

When a court has determined that an accused is incompetent to be brought to trial because of insanity, the question then arises what is to be done with the accused pending his restoration to sanity. The accused is in lawful custody of the federal government, charged with a federal offense. It seems clear that, provided the requisites of due process are satisfied, the federal government would have power to confine such an accused to a mental hospital pending his restoration to sanity. But such a person could not be committed to a mental institution for an indefinite period without a judicial determination of his present insanity after notice and opportunity to be heard. See *Barry* v. *Hall*, 98 F.(2d) 222 (App. D.C., 1938). In that case, which arose on habeas corpus, a seaman in the United States Merchant Marine had been committed to a mental institution by request of the Treasury Department under 24 U.S.C. s 193 without any determination of the question of his sanity. The court held that since insanity is not a crime, the constitutional guaranty of a jury trial is not applicable, but none the less notice and opportunity to be heard were essential to the validity of any commitment to a mental institution. Where the trial judge, after notice and opportunity to be heard, has determined, with or without the aid of a jury, that an accused person is presently so insane as to be unable to stand trial, the requirements of due process have been satisfied, and the accused might constitutionally be committed to a mental hospital by court order.

If the accused's mental disability appears not to be a transitory condition, but in all likelihood he will, because of his insanity, never be brought to trial, it would seem that as a general rule the federal government should not assume responsibility for his hospitalization merely because he has been accused (but not convicted) of a federal crime. Normally such a person should be turned over to the state of his domicile to be confined in a state mental hospital if hospitalization is called for.

But there may be cases where the accused's domicile cannot be satisfactorily established and where no state will assume responsibility for his care. The federal government may then be faced with the practical situation that it has lawful custody of a person whom it is not safe to let at large. In a recent case in the District of Massachusetts, *United States* v. *Torrez*, a Filipino was brought into the district and indicted for murder on the high seas. After notice of hearing at which alienists for the government and for the defendant testified, the judge found that the defendant was at present insane and unable rationally to aid in the conduct of his defense. Obviously in such case there should be authority in the court to cause the confinement of the accused in a mental hospital.

Provisions of the Code dealing with the foregoing situation are found in 24 U.S.C. ss 211 and 212, reading as follows:

> "s 211. Admission of insane persons accused of crime.
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> If any person, charged with crime, be found, in the court before which he is so charged, to be an insane person, such court shall certify the same to the Federal Security Administrator, who may order such person to be confined in Saint Elizabeths Hospital, and, if he be not indigent, he and his estate shall be charged with expenses of his support in the hospital. (R.S. s. 4851; July 1, 1916, ch. 209 s 1, 39 Stat. 309; Reorg. Plan No. IV, ss 11(a), eff. June 30, 1940, 5 Fed. Reg. 2422, 54 Stat. 1236.)

s 211a. Admission of insane convicts.

Any person becoming insane during the continuance of his sentence in the United States penitentiary shall have the same privilege of treatment in Saint Elizabeths Hospital during the continuance of his mental disorder as is granted in section 211 of this title to persons who escape the consequences of criminal acts by reason of insanity, unless it be the opinion, both of the physician to the penitentiary and the superintendent of the hospital, that such insane convict is so depraved and furious in his character as to render his custody in the hospital insecure, and his example pernicious. (R.S. s 4852; July 1, 1916, ch. 209, s 1, 39 Stat. 309.)

s 211b. Insane persons accused of crime; delivery to court on restoration to sanity.

When any person confined in Saint Elizabeths Hospital charged with crime and subject to be tried therefor, or convicted of crime and undergoing sentence therefor, shall be restored to sanity, the superintendent of the hospital shall give notice thereof to the judge of the criminal court, and deliver him to the court in obedience to the proper precept. (R.S. s 4855; July 1, 1916, ch. 209, s 1, 39 Stat. 309.)

s 212. Transfer of insane convicts.

Upon the application of the Attorney General the Federal Security Administrator is authorized and directed to transfer to Saint Elizabeths Hospital in the District of Columbia all persons who, having been charged with offenses against the United States, are in the actual custody of its officers, and

> all persons who have been or shall be convicted of any offense in a court of the United States and are imprisoned in any State prison or penitentiary of any State or Territory, and who during the term of their imprisonment have or shall become and be insane. (June 23, 1874; ch. 465, s 1, 18 Stat. 251; Aug. 7, 1882, ch. 433, s 1, 22 Stat. 330; July 1, 1916, ch. 209, s 1, 39 Stat. 309; Reorg. Plan No. IV ss 11(a), eff. June 30, 1940, 5 Fed. Reg. 2422, 54 Stat. 1236.)"

An early opinion of the Attorney General initiated that these sections, though couched in general terms, were limited to persons accused of crime in the District of Columbia, 17 Op. A.G. 211 (1831). However, it is not believed that this is so, and in many cases courts have acted on the broader interpretation that the sections authorize committal of any insane person charged with a federal crime. *United States* v. *Torrez*, *supra*, was such a case. Another was the unreported case of *United States* v. *Hooks* in the Southern District of Florida. Hooks was indicted for writing threatening letters to the President. The court inquired into the accused's mental condition, and, upon receiving the report of an alienist, adjudged the accused mentally deficient and ordered him to be held by the United States Marshal for admission and commitment to Saint Elizabeths Hospital, Washington, D.C., under 24 U.S.C. s 212. The Director of the Bureau of Prisons states with reference to this case: "Ordinarily we would resist taking custody but since Hooks seems so paranoid and threatening toward the President, we have resumed custody. Incidentally the U. S. Attorney reports 'There is grave doubt whether Samuel Hawkins Hooks is a citizen of Florida or citizen of Georgia. Neither State will accept him.'"

Many cases arise where insanity develops, or becomes manifest, after a person has become convicted and been sent to the penitentiary. The Bureau of Prisons now has ample authority to transfer such persons to federal institutions which specialize in mental disorders. See 18 U.S.C. ss 874 et seq. Section 876 establishes a board of examiners for each correctional institution consisting of a medical officer appointed by the warden or superintendent of the institution, a medical officer appointed by the Attorney General, and a competent expert in mental diseases nominated by the Surgeon General of the Public Health Service. If such board finds that an inmate of the institution is "insane or of unsound mind or otherwise defective," the board reports its findings to the Attorney General, who may direct such prisoner to be removed "to the United States hospital for defective delinquents or to any other such institution as is now authorized by law to receive insane persons charged with or convicted of offenses against the United States, there to be kept until, in the judgment of the superintendent of said hospital, the prisoner shall be restored to sanity or health or until the maximum sentence, without deduction for good time or commutation of sentence, shall have been served." The Medical Center for Federal Prisoners at Springfield, Missouri, is the institution to which most prisoners are sent under this authority.

The constitutionality of 18 U.S.C. s 876 was upheld in *Douglas* v. *King*, 110 F.(2d) 911 (C.C.A. 8th, 1940), a habeas corpus case, as against the contention that it was invalid for failure to provide for a judicial inquiry, trial or judgment in determining the mental condition of the prisoner. In other words, where the prisoner is already in lawful federal custody upon conviction for an offense, he may be transferred to a mental hospital without a judicial determination of his insanity. *Accord, Estabrook* v. *King*, 119 F.(2d) 607 (C.C.A. 8th, 1941).

18 U.S.C. s 878 provides:

> "s 878. Disposition of defective delinquents in hospital on expiration of sentence.
>
> It shall be the duty of the superintendent of said hospital to notify the proper authorities of the State, District, or Territory where any insane convict shall have his legal residence, or, if this cannot be ascertained, the proper authorities of the State, District, or Territory from which he was committed, of the date of the expiration of the sentence of any convict who, in the judgment of the superintendent of said hospital, is still insane or a menace to the public. The superintendent of said hospital shall cause to be delivered into the custody of the proper authorities of the State, District, or Territory the body of said insane convict. (May 13, 1930 ch. 254, s 8, 46 Stat. 272.)"

This section furnishes the only statutory guide for dealing with one serious problem faced by the Bureau of Prisons, namely, what to do with insane criminals upon the expiration of their terms of confinement, where it would be dangerous to turn them loose upon society and where no state will assume responsibility for their custody. There should be some provision of law authorizing the continued confinement of such persons after their sentences expired. Of course it would be necessary to provide for notice and hearing and judicial determination of insanity in order to justify further confinement by the federal authorities after the prisoner's term of sentence has expired.

The committee has had under consideration proposals for legislation dealing with the whole matter. The draft which the committee had before it last year was unsatisfactory to various members of the committee in certain details, and we were not prepared to make any recommendations as to legislation in our interim report submitted to the Judicial Conference in September, 1944. Since then, the draft which the committee had under consideration, together with comments and criticisms by members of the committee and others, was submitted to the Attorney General, with whom our committee has been directed to cooperate in making its study. The draft has been revised by Fowler Hamilton, Esq., and other officials of the Department of Justice designated by the Attorney General. The committee does not at this time gave final approval to the revised draft in its present form. Before this is done we should, according to the usual procedure, circulate the draft among all the federal district and circuit judges for their comments and criticisms, and after the replies have come in the committee should consider whether further revisions are desirable in the light of the comments received. This is what the committee proposes to do if the Conference chooses to continue the committee further and if the Conference believes that the revised draft statute, which is appended to this report, offers a promising working basis for legislation. There is also appended to this report a letter from the Director of Prisons dated June 25, 1945, giving the reviewed draft his general endorsement.

The draft bill, sets forth a procedure for raising the issue as to the mental competence of an accused and for the determination of such issue; it also makes provision for the disposition of an accused who has been judicially determined to be incompetent to stand trial. The bill also provides a procedure for setting aside a conviction where the issue of mental competency was not raised and determined before or during the trial, and where such mental incompetence became apparent after the defendant was sent to prison. Further, the bill makes provision for federal commitment, under narrowly defined conditions, of insane prisoners whose sentence is about to expire and whose release might endanger "the safety of the officers, currency, domain or other interest of the United States". These are the main features of the bill.

It will be noted that the draft makes no provision for "psychiatric examinations as a matter of course in a class of cases, to be determined, in which the offenders are most apt to be insane", a matter which the committee was directed to consider further by the action of the Judicial Conference last year. This suggestion was advanced by Mr. Bennett, the Director of Prisons, who originally thought that it could be satisfactorily established by statistics that insanity was most apt to be found in certain definite types of crime. As will be seen from Mr. Bennett's letter of June 25, 1945, appended hereto, further study of the available federal statistics as to the incidence of insanity revealed no significant differences on the basis of offenses committed.

At the meeting of the Judicial Conference in 1944, our committee was further charged with giving consideration to "the protection of courts from insane litigants and a suitable procedure for dealing with such persons." The committee is not convinced of the need of any special legislation for the protection of judges. In this connection it is appropriate to refer to H.R. 2200 (79th Cong., 1st Sess.), a bill reported by the Committee on Revision of the Laws to revise and modify the Criminal Code. Sections 111 and 114 of the proposed revision of the Criminal Code, dealing with assaulting, intimidating, and killing federal officers, have enlarged the present 18 U.S.C. ss 253 and 254 to include federal judges within their protection. Section 876 of the proposed revision of the Criminal Code makes it a crime to send through the mails any communication containing a threat to injure the person of the addressee or of another, which of course would include threats against federal judges.

Respectfully submitted,

Learned Hand
Curtis D. Wilbur
Charles C. Simons
Otto Kerner
Bolitha J. Laws
Carroll C. Hincks
Calvert Magruder - Chairman

BILL TO PROVIDE FOR THE CARE AND CUSTODY OF INSANE PERSONS CHARGED WITH OR CONVICTED OF OFFENSES AGAINST THE UNITED STATES, AND FOR OTHER PURPOSES

Section 1. Whenever the United States attorney has reasonable cause to believe that a person charged with an offense against the United States is presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion setting forth the grounds for his belief with the Court in which proceedings are pending. Thereupon, the Court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the Court. For the purpose of the examination the Court may order the accused committed for such reasonable period as the Court may determine to a suitable hospital or other facility to be designated by the Court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the Court shall hold a hearing, upon notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused in any criminal proceeding. In like manner, either before trial or at any subsequent stage in the proceedings in the District Court, on motion of the accused the Court shall, or upon its own motion may, inquire into and determine the mental incompetency of the accused to stand trial, provided, however, that if the issue as to such mental incompetency is not raised until after the trial of the principal issue has begun, the Court, in its discretion, may submit the question to the jury together with the principal issue, requiring a special verdict as to such mental incompetency of the accused.

Section 2. Whenever the Director of the Bureau of Prisons shall certify that a person convicted of an offense against the United States has been examined by a board of examiners established pursuant to the Act of May 13, 1930 (U.S.C., Title 18, Secs. 876-879) and that there is probable cause to believe that such person was mentally incompetent at the time of his trial, provided the issue of mental competency was not raised and determined before or during said trial, the Attorney General shall transmit the report of the board of examiners and the certificate of the Director of the Bureau of Prisons to that Clerk of the district wherein the conviction was had. Whereupon the Court shall hold a hearing to determine the mental competency of the accused in accordance with the provisions of Section 1 above, and in such hearing the certificates of the Director of the Bureau of Prisons shall be prima facie evidence of the Facts and conclusions certified therein. If the Court shall find that the accused was mentally incompetent at the time of his trial, the judgment shall be vacated, and the Court may grant a new trial or commit the accused in accordance with Section 3 hereafter, depending upon the then mental competency of the accused to stand new trial.

Section 3. Whenever the District Court shall determine in accordance with Section 1 or 2 of this Act that an accused is mentally incompetent, the Court may commit the accused to the custody of the Attorney General or to his authorized representative.

Section 4. Whenever the Director of the Bureau of Prisons shall certify that a prisoner whose sentence is about to expire has been examined by the Board of Mental Examiners established pursuant to the Act of May 13, 1930 (18 U.S.C., Secs. 876-879) and that in the judgment of the Director and of the board of examiners the prisoner is insane or mentally incompetent, and that if released he will probably endanger the safety of the officers, currency, domain or other interest of the United States, and that suitable arrangements for the custody and care of the prisoner are not otherwise available, the Attorney General shall transmit the certificate to the Clerk of the Court for the district in which the prisoner is confined. Whereupon the Court shall, after notice, hold a hearing to determine whether the conditions set out in the certificate exist, and in such hearing the certificate shall be received as prima facie evidence of the facts and conclusions certified therein. If upon such hearing the Court shall determine that the conditions set out in the certificate exist, the Court may commit the prisoner to the custody of the Attorney General or his authorized representative.

Section 5. Whenever a person shall be committed pursuant to any of the prevision of this Act, his commitment shall run until the sanity or mental competency of the person shall be restored, or until the mental condition of the person is so improved that if he be released he will not endanger the safety of the officers, currency, domain or other interest of the United States, or until suitable arrangements have been made for the custody and care of the prisoner. The Attorney General or his authorized representative shall have authority to transfer such person to the custody of the proper authorities of the State of which he was a resident at the time of his commitment

Section 6. The Attorney General may authorize the use of any unexpended balance of the appropriation for "support of United States prisoners" for carrying out the purposes of this Act or in payment of any expenses incidental thereto and not provided for by other specific appropriations.

Section 7. This Act shall be construed to supplement the related provisions of the Act entitled "An Act to Establish a Hospital for Defective Delinquents", approved May 13, 1930, 46 Stat. 270 (U.S.C. Title 18, Secs. 876-879); and to supersede any conflicting provisions of the Act entitled "An Act Supplementary to 'An Act to Organize an Institution for the Insane of the Army and Navy, and of the District of Columbia, in Said District'", approved February 7, 1857, 11 Stat. 1589, amended (U.S.C. Title 24, Secs. 211-211b), and of the Act entitled "An Act to Provide for the Care and Custody of Persons Convicted in the Courts of the United States Who Have or May Become Insane While Imprisoned", approved June 23, 1874, 12 Stat. 251, as amended (U.S.C. Title 24, Sec. 212).

Section 8. This Act shall take effect upon its approval.

Office of the Attorney General
Washington, D. C.

September 24, 1945

Honorable Calvert Magruder
United States Circuit Court of Appeals,
1634 P.O. and U.S. Court House,
Boston, Massachusetts.

My dear Judge Magruder:

You have informally requested my personal views regarding a proposed bill to provide for care and custody of insane persons charged with or convicted of Federal crimes. The bill to which you refer, a copy of which is enclosed, has been drafted for the Judicial Conference of Senior Circuit Judges by a subcommittee, of which you are a member, in cooperation with several members of my staff. I understand that the bill will be presented to the Judicial Conference at its next meeting and that it is in this connection that you desire my views.

The bill provides a procedure for examining into the mental competency of an accused either before or during a trial, whenever a question of the accused's mental competency is properly brought to the attention of the court. (Section 1) It also provides for a review of the mental competency of a person convicted of a Federal offense in cases where the question of his competency was not passed upon at the trial and there is probable cause to believe that he was mentally incompetent at the time of the trial. (Section 2) The Federal District Courts are authorized to commit persons found to be mentally incompetent under Sections 1 or 2 (Section 3) and also in an extremely limited number of cases to commit persons who are mentally incompetent Federal prisoner [*sic*], upon expiration of their sentences. (Section 4) Both the circumstances under which any such person can be committed and the term of his commitment are carefully limited. (Section 5) The expenditure of certain appropriations in carrying out the purposes of the act is authorized (Section 6) and the relation of the act to existing legislation dealing with the same subject matter is defined. (Section 7)

In discharging its responsibilities for the prosecution of Federal offenses and for the care and custody of Federal prisoners, the Department of Justice continually encounters the problems and difficulties which the bill is designed to remedy. It is my view that the bill provides reasonable and practicable methods for dealing with these. I believe that if enacted it would substantially improve existing procedures applicable to mentally incompetent persons who may be charged with or convicted of Federal crimes.

I am sending a copy of this letter and of the proposed bill to the Director of the Bureau of the Budget, so that he may consider the matter from the standpoint of the over-all program of the President.

Sincerely yours,

Tom Clark
Attorney General.

cc Honorable Harold D. Smith
Director of the Bureau of the Budget.

- Copy -

DEPARTMENT OF JUSTICE
Bureau of Prisons
Washington 25

June 25, 1945

Honorable Calvert Magruder
United States Circuit Court of Appeals
Boston, Massachusetts

My dear Judge Magruder:

I am very much heartened at the progress that has been made on the bill to provide for the care and custody of insane prisoners charged with or convicted of offenses against the United States. I think that the present draft of the bill will be of tremendous help to the courts and to this Department in dealing with such cases since, if enacted, it will clearly and precisely define the procedure to be followed in the Federal courts with respect to such cases and assure an adequate hearing when mental disability is alleged or suspected. Moreover, it will make it possible for this Bureau to dispose of the cases of mentally incompetent prisoners in an orderly manner and in accordance with policies approved by the Congress. I hope that this bill will be approved by the Judicial Conference and promptly enacted.

For your information and assistance in preparing your report on the bill I am summarizing below some additional data concerning insane prisoners which may be of value to you. You will remember that in your progress report to the Chief Justice last fall you referred to a survey of 500 insane prisoners admitted to the Medical Center for Federal Prisoners during the period 1937 to 1941. An analysis of this group revealed that 27.8 percent were insane or potentially insane at the time of trial and 37.4 percent were found to be insane during the first six months of confinement. In my letter of September 7, 1944, I suggested it might be well to require a routine psychiatric examination for persons charge [*sic*] with (1) sending extortion, threatening or obscene letters through the mails, (2) arson, (3) impersonation of a government official, (4) murder, or (5) any capital offense. It was my understanding and belief that such offenders made up the majority of the insane at the Medical Center and a mandatory psychiatric examination for all persons charged with these offenses would thus have the effect of routinely passing upon the mental competency of the largest group of those who are found to be insane after conviction. Additional factual information concerning these and other matters has recently been obtained from the Medical Center.

A study of 656 insane prisoners received at the Medical Center 1939 to 1944, disclosed that 361 or 55 percent were presumably psychotic at the time of trial. Fifty percent of this group were certified as insane within six months of conviction. The onset of psychosis is usually insidious, a matter of months or even years, and evidence of mental illness prior to trial was based on a verified history of psychosis, statements in the presentence investigation report questioning the sanity of the offender, similar statements in U.S. Attorney's report and information from social agencies and other sources. This study then is in agreement with the survey of the 500 cases admitted during 1937 to 1941 with respect to the large number of prisoners who were insane at the time of trial. It should be mentioned that the number of insane prisoners has steadfastly ranged between one and two percent of the total prison population.

Further reference to the 1937-1941 survey indicates no significant difference among insane and other prisoners according to the offense committed. This finding has been confirmed by comparing insane prisoners admitted to the Medical Center with the total admissions to all Federal Penal and Correctional Institutions for the fiscal year 1939-1940, a typical prewar year. No significant differences were found on the basis of offenses committed. A similar study for the fiscal year 1943-1944 revealed one important finding: 34 percent of the insane prisoners were Selective Service Law violators in contrast to 21 percent admitted to all Federal Penal and Correctional Institutions. These findings indicate that insanity does not occur any more frequently among offenders included in the categories mentioned in my letter of September 7, 1944, than among other types of offenders. However, minor mental disorders and transient psychotic episodes are rather common among extortionists, arsonists, impersonators, those who send obscene literature through the mails and those who commit capital offenses. For these reasons I think it is well that the drafted bill does not specify a routine psychiatric examination for certain types of offenders as required by the "Briggs' law" as I formerly suggested.

The progress and final disposition of the 656 insane prisoners admitted to the Medical Center during 1939 to 1944 have also been considered. About one-half of them were removed from psychotic status and released at expiration of sentence without further medical or hospital care. Actually some of them were still psychotic or insane according to medical standards but because of difficulty or the impossibility of securing hospitalization and because they were relatively harmless they were given the benefit of the doubt. Of the 329 prisoners who were markedly insane, hospital care was secured in advance for 49 percent and the remainder were delivered to sheriffs. Some information has been obtained on 213 of the discharged insane prisoners for whom further hospital care was indicated and recommended and who were accompanied to their destinations by officers of the Medical Center. Questionnaires were recently sent to the final destination of each of the 213 insane prisoners. They were addressed to a mental hospital, or a sheriff, with the following results:

A. Delivered to mental hospitals			91
Remaining in hospital		43	
Discharged		33	
Died		2	
No response		13	
B. Delivered to Sheriffs			122
Committed to hospitals		55	
Remaining in hospitals	31		
Discharged	18		
Died	2		
Released forthwith by Sheriff		24	
Sanity hearing and released		6	
Sheriff refused to accept		3	
No response		38	
C. Current status			213
Remaining in hospitals		74	
At large or possibly in prison		84	
Dead		4	
Unknown		41	

This group of 213 prisoners were afflicted with mental illness of a pronounced and presumably of a chronic nature. Because of the psychosis, usually coupled with criminal tendencies, each individual was considered a menace to himself or others and the authorities at his destination were so advised. Even though due allowances are made for spontaneous remissions and periods of improvement, it is obvious that too many of them were granted their liberty if the best interests of the patients and the welfare of society are to be considered. Unfortunately the data from the Medical Center does not compare the final disposition of insane prisoners returned to their legal domicile with those delivered to the place of conviction in lieu of a legal state of residence. It is suspected that many of those who were released forthwith by sheriffs or discharged from hospitals shortly after admission fall in the latter category, and it is hoped that information will become available on this point.

Although it is evident that Federal courts are now more alert to screening out insane persons charged with crime, it is clear that a considerable number are being convicted and sentenced. It is equally clear that some mentally ill prisoners are being released from the Medical Center for whom it is later ascertained that further control and care are indicated. To a certain extent this is unavoidable because the legal and psychiatric professions have not progressed to the point where it is always possible to say that a certain person is insane or sane. When dealing with borderline cases the determination rests largely on human judgment rather than facts which can be measured. Under present day circumstances it is perhaps still advisable to send doubtful or controversial cases to prison and release them at the expiration of sentence because very few mental hospitals are able or willing to care for them. On the other hand no reasonable doubt is involved when considering offenders who are mentally afflicted to a moderate or marked degree. The above survey of such cases clearly indicates that too many of them have been convicted and too many of them have been deprived of hospital and medical care following expiration of sentence. I am convinced that the proposed bill will largely correct these defects.

Please let me know if you think I can be of further assistance.

With kind personal regards,

Sincerely yours,

JAMES V. BENNETT
Director

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-7671

UNITED STATES, PETITIONER-APPELLANT

v.

GRAYDON COMSTOCK, JR., THOMAS MATHERLY,
MARVIN VIGIL, MARKIS REVLAND, AND
SHANE CATRON, RESPONDENTS-APPELLEES

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

REPLY BRIEF FOR THE APPELLANT

* * * * *

ARGUMENT

I. THE CIVIL COMMITMENT PROCEEDINGS AUTHORIZED BY THE ADAM WALSH ACT, 18 U.S.C. § 4248, ARE A LAWFUL EXERCISE OF CONGRESS'S ARTICLE I POWERS.

* * * * *

E. Respondents Do Not Dispute That Where The Power To Prosecute Is Unexhausted, Congress May Authorize Civil Commitment.

As we showed in our opening brief, *see* Gov't Br. at 37-41, the government's power to prosecute is unexhausted with regard to respondent Shane Catron. Respondents implicitly acknowledge that Catron's civil commitment proceedings are valid under *Greenwood* v. *United States*, 350 U.S. 366 (1956).

Respondents urge that the other respondents cannot be retried for their underlying offenses. *See* Appellees' Br. at 54-56. That is, of course, the case and the government did not suggest otherwise. Our brief noted only that upon release former inmates remain subject to a special relationship with the government in which they can be returned to custody for violations of the terms of their supervised release—i.e., for conduct that would not otherwise constitute any federal offense. *See* Gov't Br. at 41-42.

* * * * *

SUPREME COURT OF THE UNITED STATES

No. 08A863 (08-1224)

UNITED STATES, APPLICANT

v.

GRAYDON EARL COMSTOCK, JR., ET AL.

ORDER

UPON CONSIDERATION of the application of the Solicitor General,

IT IS ORDERED that the mandate of the United States Court of Appeals for the Fourth Circuit, case No. 07-7671, is hereby stayed pending the disposition of the petition for a writ of certiorari. See *Walters* v. *National Assn. of Radiation Survivors*, 468 U.S. 1323 (1984) (Rehnquist, J., in chambers) ("The presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of applicants in balancing hardships"). Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

/s/ John G. Roberts, Jr.
Chief Justice of the United States

Dated this 3rd
day of April, 2009.

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
AUG 28 2009
OFFICE OF THE CLERK

⑤

No. 08-1224

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GRAYDON EARL COMSTOCK, JR., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Congress had the power under Article I of the Constitution to enact 18 U.S.C. 4248, which authorizes court-ordered civil commitment by the federal government of (1) "sexually dangerous" persons who are already in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences, and (2) "sexually dangerous" persons who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following four individuals were parties in the court of appeals proceeding, which consolidated five cases from the district court: Shane Catron; Thomas Matherly; Markis Revland; and Marvin Vigil.

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In the Supreme Court of the United States

No. 08-1224

UNITED STATES OF AMERICA, PETITIONER

v.

GRAYDON EARL COMSTOCK, JR., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 551 F.3d 274. The opinion of the district court (Pet. App. 22a-95a) is reported at 507 F. Supp. 2d 522.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 2009. A petition for rehearing was denied on March 10, 2009 (Pet. App. 96a). The petition for a writ of certiorari was filed on April 3, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Necessary and Proper Clause of the United States Constitution, Article I, Section 8, Clause 18, provides: "The Congress shall have Power * * * [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Relevant statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-18a.

STATEMENT

Respondents in this case challenge Congress's power to authorize the United States Government to seek court-ordered civil commitment of "sexually dangerous person[s]" who are serving terms of imprisonment because of federal criminal convictions or who have been found mentally incompetent to stand trial on federal criminal charges. In 2006, Congress provided for such commitment proceedings when it added 18 U.S.C. 4248 to the longstanding statutory framework for civil-commitment procedures that apply to persons in federal custody.

1. Federal law began to provide in the middle of the nineteenth century for the United States to assume special control over and responsibilities for some mentally ill persons, including members or former members of the military, residents of the District of Columbia, and individuals who are "in its custody and undergoing imprisonment under its authority." *Government Hosp. for the Insane*, 17 Op. Att'y Gen. 211, 213 (1881). See, *e.g.*, Act of Feb. 7, 1857, ch. 36, §§ 5 and 6, 11 Stat. 158; Act of June 23, 1874, ch. 465, § 1, 18 Stat. 251; Act of Aug. 7, 1882, ch. 433, 22 Stat. 330. Such statutes were seen as vindicating a "duty of the United States" to appropriately treat and superintend, among others, "convicts

who may become insane while in her custody." 17 Op. Att'y Gen. at 212-213 (emphasis omitted).

In instances involving federal prisoners, Congress did not make explicit whether federal custody was to continue beyond the end of the underlying criminal sentence that had caused an individual to come into the government's custody. Largely because the statutes lacked any mechanism for "notice and proper hearing" about whether such a prisoner's mental condition justified "[l]onger detention," the Attorney General construed those statutes as authorizing federal commitment only until the expiration of the criminal sentence. *Commitment to Gov't Hosp. for the Insane*, 30 Op. Att'y Gen. 569, 571 (1916); see also *Care of Insane Convict After Expiration of Term of Imprisonment*, 35 Op. Att'y Gen. 366, 367-369 (1927) (relying on both the 1916 opinion and additional evidence of congressional intent). At that point, it was assumed that the convict would be returned to the place of his former residence, where new commitment proceedings could be initiated under local authority. *Id.* at 368-369; see also Act of May 13, 1930, ch. 254, §§ 6 and 8, 46 Stat. 271, 272 (providing for federal hospitalization of an insane federal prisoner until his maximum sentence was served, and then for "deliver[y] into the custody of the proper authorities of the State, District, or Territory" if the prisoner remained "insane or a menace to the public" when his sentence expired).

The States were not, however, always able and willing to assume custody of mentally ill criminals whom the federal government might release—either before any trial had occurred or at the end of a term of imprisonment. Against that backdrop, in September 1942, the United States Judicial Conference authorized the Chief Justice "to appoint a committee to study * * * the treatment accorded by the federal courts to insane persons charged with crime." J.A. 61. In discharging its task, that committee of federal judges considered how to respond to the "serious problem" of "what to do with insane criminals upon the expiration of their terms of confinement, where it would be dangerous to turn them loose upon society and where no [S]tate will assume responsibility for their custody." J.A. 73. The committee also addressed a similar problem that had arisen with regard to individuals who were in federal custody because they had been charged with federal offenses but found mentally unfit for trial, and for whom no State would "assume responsibility," even though it was "not safe" for them to be "let at large." J.A. 69.[1]

Responding to the Judicial Conference's recommendations, Congress enacted a comprehensive framework for the court-ordered commitment of various categories of persons in federal custody. See Act of Sept. 7, 1949, ch. 535, 63 Stat. 686 (18 U.S.C. 4244-4248 (1952)). Those categories, as currently identified in governing statutory provisions, include persons found to be mentally incompetent to stand trial or to undergo postrelease proceedings (18 U.S.C. 4241, 4246); persons found not guilty by reason of insanity (18 U.S.C. 4243); persons determined to be suffering from a mental disease or defect either before sentencing (18 U.S.C. 4244) or while imprisoned (18 U.S.C. 4245); and federal prisoners whose terms of imprisonment are about to expire but who suffer from a mental disease or defect that would cause their release to create a substantial risk of bodily injury or serious property damage (18 U.S.C. 4246).

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[1] The committee's 1945 report is reprinted at J.A. 61-88.

The procedural safeguards for commitment hearings conducted under this statutory framework are set out in 18 U.S.C. 4247. They include provisions for a court-ordered psychiatric or psychological examination, representation by counsel (including appointed counsel), and the opportunity to testify, present evidence, subpoena witnesses, and confront and cross-examine witnesses who appear at the hearing. 18 U.S.C. 4247(b)-(d).

2. That regime for civil commitment of persons in federal custody was amended and supplemented by Title III of the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act), Pub. L. No. 109-248, 120 Stat. 617. As relevant here, the Adam Walsh Act added 18 U.S.C. 4248, which expressly authorizes the federal government to seek the court-ordered civil commitment of certain "sexually dangerous person[s]" already in its custody. § 302(4), 120 Stat. 620.[2] Section 4248 incorporates the pre-existing procedural safeguards that Section 4247 provides for other forms of federal civil commitment. And, like its analogue in Section 4246, Section 4248 applies, *inter alia*, to persons who are completing terms of federal imprisonment in the custody of the Bureau of Prisons (BOP) and to persons who have been

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[2] The Adam Walsh Act also contained various other provisions dealing with sex offenders, including, for example, registration and notification requirements. See §§ 101-146, 120 Stat. 590-607. None of those provisions is implicated by this case, which deals only with civil commitment by the federal government (and possible commitment by the States, to the extent they choose to assume responsibility for the custody, care, and treatment of individuals to whom Section 4248 applies, see 18 U.S.C. 4248(d)).

found mentally incompetent to stand trial on federal criminal charges.[3]

A commitment proceeding under Section 4248 is initiated when the Attorney General, the Director of the BOP, or one of their designees or delegees certifies to the federal district court for the district in which a person is confined "that the person is a sexually dangerous person." 18 U.S.C. 4248(a). As defined by the statute, the term "sexually dangerous person" requires the government to make two showings by "clear and convincing evidence." 18 U.S.C. 4248(d). First, the government must prove that the respondent has previously "engaged or attempted to engage in sexually violent conduct or child molestation." 18 U.S.C. 4247(a)(5). Second, the government must prove "that the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. 4247(a)(6).[4]

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[3] The two categories of persons mentioned in the text are the categories represented by the facts of respondents' cases. In full, Section 4248—like Section 4246—applies to persons who are in the custody of the BOP, who have been committed to the custody of the Attorney General because they have been determined to be mentally incompetent either to stand trial or to undergo postrelease proceedings, or who have had all criminal charges against them dismissed solely for reasons relating to their mental condition. See 18 U.S.C. 4248(a); see also 18 U.S.C. 4248(g) (specifying that if federal criminal charges are dismissed "for reasons not related to the mental condition of the person," continued federal detention is not authorized under Section 4248).

[4] The scope of Section 4248 differs from that of Section 4246 in two principal respects. First, Section 4248 is limited to a specific kind of dangerousness—"sexually violent conduct or child molestation"—whereas Section 4246 addresses those who would pose "a substantial risk of bodily injury to another person or serious damage to property

Once the government has initiated a commitment proceeding in federal district court by filing a certificate of sexual dangerousness, the statute "stay[s] the release" of the respondent from federal custody "pending completion of procedures contained in [Section 4248]." 18 U.S.C. 4248(a). Those procedures—which incorporate some pre-existing provisions from Section 4247 that apply to other parts of the civil-commitment framework—include an opportunity for the district court to order a psychiatric or psychological examination (to be followed by the filing of a report with the court), and a mandatory district court "hearing to determine whether the person is a sexually dangerous person." 18 U.S.C. 4248(a)-(c); see 18 U.S.C. 4247(b). At the hearing, the respondent is entitled to be "represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him." 18 U.S.C. 4247(d); see 18 U.S.C. 4248(c). The respondent must be given "an opportunity to testify, to present evidence, to

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of another," 18 U.S.C. 4246(a). Second, the two sections use different language to describe the mental condition from which the person suffers. The legislative history of Section 4248 describes concern that the definition of "mental disease or defect" in prior statutes like Section 4246 had been applied too narrowly to reach some "sex offenders with mental disorders who are clearly dangerous." H.R. Rep. No. 218, 109th Cong., 1st Sess. Pt. 1, at 29, 54 (2005). Similar concerns had caused many States to supplement their civil-commitment provisions for the mentally ill with provisions directed specifically at sexually violent predators. See *Kansas* v. *Hendricks*, 521 U.S. 346, 351-352 (1997). The legislative history reflects Congress's intention that the standards and procedures in Section 4248 be "substantively similar to those approved" by this Court in *Hendricks* and in *Kansas* v. *Crane*, 534 U.S. 407 (2002). See H.R. Rep. No. 218, *supra*, at 29, 55; see also *Hendricks*, 521 U.S. at 358 (noting that this Court has "sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality'").

subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing." 18 U.S.C. 4247(d). The government bears the burden of proving "by clear and convincing evidence that the person is a sexually dangerous person." 18 U.S.C. 4248(d).

If the district court finds, after the hearing, that the government has carried its burden of proving sexual dangerousness, the respondent is committed to the custody of the Attorney General. 18 U.S.C. 4248(d). At that point, the statute requires that "[t]he Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment." *Ibid.* To that end, the Attorney General is required to "make all reasonable efforts to cause such a State to assume such responsibility." *Ibid.* The statute further provides:

> If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall place the person for treatment in a suitable facility, until—
>
> (1) such a State will assume such responsibility; or
>
> (2) the person's condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment;
>
> whichever is earlier.

Ibid.; see 18 U.S.C. 4247(a)(2) (defining a "suitable facility" as one that "is suitable to provide care or treatment given the * * * characteristics of the defendant").

Once a person is committed to a federal facility under Section 4248, the director of that facility must "prepare annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued commitment." 18 U.S.C. 4247(e)(1)(B). Those reports are to be "submitted to the court" that ordered the commitment. *Ibid.* The director must also inform the committed person of "any rehabilitation programs that are available" in the facility. 18 U.S.C. 4247(e)(2). If the director determines that the committed person "is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment, [the director] shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment." 18 U.S.C. 4248(e). The court must then either order the person's discharge or hold a hearing to determine whether he should be released and, if so, under what conditions. *Ibid.*

Even if the director has not determined that a committed person is no longer sexually dangerous, that person's "counsel" or "legal guardian may, at any time during [that] person's commitment, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from [the federal] facility," so long as no court has ordered his commitment within the preceding 180 days. 18 U.S.C. 4247(h).

Finally, Congress has specified that nothing in Section 4248 precludes a committed person from "establishing by writ of habeas corpus the illegality of his detention." 18 U.S.C. 4247(g).

3. This case comprises five civil-commitment proceedings that were initiated by the United States in the District Court for the Eastern District of North Carolina. The United States commenced proceedings against each of the five respondents pursuant to Section 4248 in November or December 2006. See J.A. 1, 7, 12, 18, 24.

When the proceedings against them began, respondents Comstock, Matherly, Vigil, and Revland were each about to complete a prison term in BOP's custody, which was to be followed by a three-year period of supervised release. Pet. App. 24a-25a & n.2. Respondent Vigil had been sentenced to a 96-month term of imprisonment after pleading guilty to one count of sexual abuse of a minor; respondents Comstock, Matherly, and Revland had been sentenced, respectively, to 37-month, 41-month, and 60-month terms of imprisonment after pleading guilty to one count each of possession of child pornography. *Ibid.* In addition to those most recent federal convictions, each respondent had a prior history of sex-related offenses.[5]

When the proceeding against the fifth respondent, Catron, was initiated, he was in federal custody pursuant to 18 U.S.C. 4241(d), because he had been found mentally incompetent to stand trial in federal court on four counts of aggravated sexual abuse of a minor under the age of 12 (in violation of 18 U.S.C. 1153 and 2241(c)) and one count of abusive sexual contact (in violation of 18 U.S.C. 1153 and 2244(a)(1)). Pet. App. 25a n.2. In accordance with Section 4241(d), he was held for treatment and evaluation to determine whether he was likely to attain capacity to proceed to trial in the foreseeable future.[6] After concluding that there was no substantial probability that he could be restored to competency and that he would be dangerous to others if released, the United States initiated a civil-commitment proceeding against him under 18 U.S.C. 4246. The Adam Walsh Act was then enacted, and the government concluded, in light of Catron's history and diagnoses, that it should instead seek his commitment under the new provision in Section 4248 dealing specifically with sexually dangerous persons. Accordingly, the government withdrew its Section 4246 certificate and filed a certificate pursuant to Section 4248. J.A. 41-43.

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[5] For example, it is a matter of public record that Comstock had a conviction for taking aggravated indecent liberties with a child; Matherly had been convicted of traveling in interstate commerce to engage in a sexual act with a minor; Vigil had been convicted of sexual abuse of a minor; and Revland had been convicted of indecent exposure. At the time of certification, the government also had additional information about each respondent that was not reflected in prior convictions but could be used to establish his history of sexually violent conduct or child molestation.

Each of the five respondents moved to dismiss the civil-commitment proceeding against him on several constitutional grounds. They claimed that Section 4248 exceeds Congress's powers under the Commerce Clause; that the clear-and-convincing standard of proof it requires is inadequate to satisfy due process; that Section 4248 violates substantive due process and the equal protection component of the Fifth Amendment; and that a commitment under Section 4248 is a criminal proceeding that violates the Ex Post Facto Clause, the Double Jeopardy Clause of the Fifth Amendment, the right to a jury trial under the Sixth Amendment, and the Eighth Amendment's prohibition on cruel and unusual punishments. Pet. App. 27a-28a.

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[6] See 18 U.S.C. 4241(d) (allowing the government to hospitalize a defendant for a reasonable period for treatment and evaluation, and then for an additional period if there is a substantial probability that he will attain capacity during that period; and further providing that, if the defendant is not expected to improve sufficiently, he "is subject to the provisions of sections 4246 and 4248").

On September 7, 2007, the district court granted respondents' motions to dismiss in a single opinion. Pet. App. 22a-95a. The district court did not address respondents' substantive due process and equal protection claims, *id.* at 94a, and it rejected all of respondents' arguments that were predicated on the proposition that Section 4248 commitment proceedings are criminal rather than civil, *id.* at 29a-32a. But the court held Section 4248 unconstitutional on its face on two grounds.

First, the district court held that Section 4248 is beyond Congress's powers under the Commerce Clause and the Necessary and Proper Clause. The court concluded that to sustain the statute under those Clauses "would allow Congress to take steps to 'prevent' all kinds of conduct that it has no ability to criminalize in the first place," because a person's tendency to engage in sexually dangerous acts does not show a "likelihood" that he "will commit a *federal* crime." Pet. App. 51a, 53a. The court sought to distinguish Section 4248 from Section 4246, which authorizes the commitment of certain mentally ill persons in federal custody when their release would create a substantial risk of bodily injury or property damage. In particular, the court found it significant that Section 4246 requires the Attorney General to certify that "suitable arrangements for State custody and care of the person are not available" before initiating federal commitment proceedings, while Section 4248 requires an inquiry into suitable stat[illegible]angements only after a federal court has authorized commitment. *Id.* at 63a-72a. The court concluded that this aspect of Section 4248 failed to incorporate sufficient "deference to the [S]tates' police and *parens patriae* powers." *Id.* at 68a.

Second, the district court held that Section 4248 fails to satisfy procedural due process, because it requires the government to prove the commission of prior acts or attempts to engage in sexually violent conduct or child molestation by "clear and convincing evidence," rather than beyond a reasonable doubt. Pet. App. 76a-93a.

The district court stayed implementation of its order pending the government's appeal. See Pet. App. 94a; J.A. 5-6, 11, 16-17, 22-23, 28-29.

4. The court of appeals affirmed. Pet. App. 1a-21a. The court held that Section 4248 is unconstitutional because it exceeds Congress's enumerated powers "to confine a person solely because of asserted 'sexual dangerousness' when the Government need not allege (let alone prove) that this 'dangerousness' violates any federal law." *Id.* at 3a-4a. The court of appeals did not reach any of respondents' other constitutional challenges to the statute, including their argument based on procedural due process. *Id.* at 4a n.1.

a. The court of appeals rejected the government's contention that Congress had the constitutional authority to enact Section 4248 incident to its undisputed authority to establish and provide for the operation of the federal criminal-justice and penal systems and to assume custodial responsibilities for its prisoners, dismissing that argument as a "novel theory" without precedential support. Pet. App. 13a. The court acknowledged that "Congress may establish and run a federal penal system," and that "consistent with its role in maintaining a penal system, the federal government possesses broad powers over persons *during* their prison sentences." *Id.* at 13a-14a. But the court concluded that those "powers are far removed from the indefinite civil commitment of persons *after* the expiration of their prison terms, based solely on possible future actions that the federal government lacks power to regulate directly." *Id.* at 14a. The court further declared that "[t]he fact of previously lawful federal custody simply does not, in itself, provide Congress with any authority to regulate future conduct that occurs outside of the prison walls." *Ibid.* The court quoted the district court's conclusion that custody is not a basis for commitment "*after* a person has completed a sentence for a federal crime, i.e., when the power to prosecute federal offenses is exhausted," and "where there has been no showing that the person is likely to engage in conduct that Congress, as opposed to the [S]tates, actually has the authority to criminalize." *Id.* at 14a-15a (quoting *id.* at 76a).

The court of appeals also rejected the government's contention that Section 4248's civil-commitment procedures further a legitimate government interest in preventing future federal offenses related to the sexual exploitation of children and sexual violence generally. Pet. App. 15a-18a. The court recognized that the federal government has the power to take reasonable steps to prevent federal crimes. The court, however, concluded that Section 4248 "sweeps far too broadly to be a valid effort to prevent *federal* criminal activity," because it "targets 'sexual dangerousness' generally" and "many commitments under [Section] 4248 would prevent conduct prohibited *only* by *state law*." *Id.* at 15a-16a. The court observed that the total number of federal prisoners is small compared to state prisoners, and that the number of prisoners in state custody for sexual assaults is much larger than the number in federal prisons for sexual crimes. *Id.* at 15a n.8.

b. The court of appeals noted that the circumstances of respondent Catron's case "differ greatly" from those of the other respondents because Catron was indicted for federal offenses but, because of his mental incompetency, has not yet been tried. Pet. App. 19a n.10. As the court of appeals recognized, in *Greenwood* v. *United States*, 350 U.S. 366 (1956), this Court explicitly upheld the federal government's authority to seek and secure the indefinite commitment of persons found incompetent to stand trial under the predecessor version of Section 4246. Pet. App. 18a-19a n.10. Accordingly, the court of appeals acknowledged that the commitment of Catron under Section 4246 "would lie within [the federal government's] constitutional authority." *Id.* at 19a n.10. The court did not explain why the same authority could not justify commitment under Section 4248, which likewise applies to persons found incompetent to stand trial. Rather, the court declined "to bifurcate Catron's unique challenge to [Section] 4248" because, it said, "no party" had asked "for such 'finely drawn' relief." *Ibid.*

c. The United States filed a timely petition for rehearing en banc, which was denied on March 10, 2009. Pet. App. 96a.

5. The United States filed a petition for a writ of certiorari on April 3, 2009.[7] Respondents generally opposed certiorari, but also argued in the alternative that,

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[7] Because the court of appeals had stayed its mandate only until April 7, 2009, the United States sought a further stay from this Court. On April 3, 2009, the Chief Justice ordered a stay of the mandate of the court of appeals' decision pending the disposition of the petition for a writ of certiorari and, in the event the petition were granted, until "the sending down of the judgment of this Court." J.A. 91.

if certiorari were granted, the Court should "exercise judicial economy" by "order[ing] the parties to address whether the Due Process Clause mandates the application of the reasonable doubt standard to the factual determination required by [Section] 4248" (Br. in Opp. 17) —a question that was decided by the district court but not by the court of appeals. The United States opposed the addition of a due process question, because that question was entirely separate from the question presented in the petition and because it had not been addressed by the court of appeals in this case or by any other court of appeals. Reply Br. 8-10.

On June 22, 2009, this Court granted the government's petition for a writ of certiorari, without accepting respondents' invitation to add a due process question to the case. See 129 S. Ct. 2828.

6. While the petition for a writ of certiorari was pending, the Eighth Circuit became the second appellate court to address the constitutionality of Section 4248. It upheld the statute's application to an individual who was about to complete a term of federal imprisonment, describing Section 4248 as "a rational and appropriate means to effectuate legislation authorized by the Constitution." *United States* v. *Tom*, 565 F.3d 497, 504 (8th Cir. 2009), petition for cert. pending, No. 09-5818 (filed Aug. 6, 2009).

SUMMARY OF ARGUMENT

A. The Necessary and Proper Clause authorizes Congress to pursue "legitimate" constitutional ends with any non-prohibited "means" that it determines to be "appropriate" for carrying into execution its other powers. U.S. Const. Art. I, § 8, Cl. 18; *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). It is undisputed that, under Article I of the Constitution, Congress may enact criminal laws addressed to subjects within its enumerated powers, provide for the operation of a federal penal system for the punishment of offenses under those laws, and assume for the United States custodial responsibilities for its prisoners. In this case, the civil-commitment proceedings authorized by 18 U.S.C. 4248 are a rational incident to those powers.

Since the mid-nineteenth century, many federal statutes have provided for the custody and treatment of mentally ill persons in whom the federal government has a special interest, such as members of the military, beneficiaries of the Bureau of Indian Affairs, and United States citizens adjudged insane in Canada. Similar statutes applied to federal convicts who became insane while imprisoned and to insane persons charged with federal crimes. The latter statutes were not used to commit prisoners beyond the end of their criminal sentences because the statutes made no provision for notice or a hearing, and local authorities were thought able to deal with the dangerously mentally ill. In time, however, it became clear that States were not always willing and able to assume responsibility for persons who could not be held by the federal government but who would pose a danger to the public if left at large.

In 1949, Congress sought to address that problem. In response to a lengthy study by a committee of the Judicial Conference, it provided for the court-ordered commitment of various categories of persons in federal custody. The covered categories included persons who were found to be mentally incompetent to stand trial or to be suffering from a mental disease or defect while imprisoned, if they would present a danger to others upon release. Those statutes reflected Congress's judgment that the exercise of federal custody over an individual—pursuant to an indictment or conviction as part of the federal criminal-justice process—makes it appropriate to take steps to mitigate significant dangers to the public that might follow from the release of an inmate with a serious mental condition.

Decades of case law concerning the civil-commitment framework from the 1940s support the proposition that Congress operates within the sphere of its legitimate authority when it provides for such steps in conjunction with the government's custodial role in operating the federal penal system. See, *e.g.*, *Greenwood* v. *United States*, 350 U.S. 366 (1956) (upholding commitment under 18 U.S.C. 4246 (1952) of a person indicted on federal charges but incompetent to stand trial); *Jackson* v. *Indiana*, 406 U.S. 715, 732-733 (1972) (describing indefinite commitment in *Greenwood* as justified because the individual was mentally incompetent and posed a danger to the public); *Jones* v. *United States*, 463 U.S. 354, 368-369 (1983) (holding that an insanity acquittee could be detained beyond the maximum sentence that would have followed a conviction because civil commitment rests on the person's "continuing illness and dangerousness").

The provision at issue in this case, 18 U.S.C. 4248, is tailored to individuals with mental disorders that make them likely to engage in acts of sexual violence or child molestation, but it serves the same legitimate ends as prior federal civil-commitment statutes. Section 4248 fulfills the responsibilities that Congress concluded the United States properly assumes as the custodian of federal prison inmates and persons charged with federal offenses, and is thus an appropriate means of executing Congress's Article I powers.

B. Much of the court of appeals' reasoning turned on its conclusion that Section 4248 is inconsistent with this Court's decisions in *United States* v. *Morrison*, 529 U.S. 598 (2000), and *United States* v. *Lopez*, 514 U.S. 549 (1995), because, in the court of appeals' view, the statute "would encroach on the police and *parens patriae* powers reserved to the sovereign [S]tates, conflating what is truly national and what is truly local." Pet. App. 12a (internal quotation marks omitted). Section 4248, however, is readily distinguishable from the statutes at issue in *Morrison* and *Lopez*. Unlike those statutes, Section 4248 includes a kind of jurisdictional element ensuring that each individual case implicates an identifiable federal interest. Section 4248(a) limits the statute's application to individuals who are already "in the custody of the Bureau of Prisons" or "committed to the custody of the Attorney General pursuant to [18 U.S.C.] 4241(d)" or "against whom all criminal charges have been dismissed * * * for reasons relating to the [person's] mental condition." As a result, the section applies only when there is a legitimate federal interest in the case. Congress thus respected the distinction between the national and the local and refrained from asserting anything like "a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.

Section 4248 also pays due respect to "the etiquette of federalism," *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring), by allowing a State to assume responsibility for the custody and treatment of a federal prisoner who was domiciled or tried in that State, and by requiring the federal government to surrender custody whenever a State chooses to assume such responsibility. 18 U.S.C. 4248(d).

The court of appeals erred in concluding otherwise based on an assumption that the federal government has no legitimate continuing interests in the prisoners subject to commitment under Section 4248. In the first place, as a result of the federal government's incarceration of those persons, Congress could reasonably conclude that the government has a special responsibility to protect the public from the dangers that could ensue from the government's own release of them. Moreover, the federal government often has a continuing relationship with prisoners who are released from federal prison (as in the case of four of respondents here) as a result of provisions for supervised release, which include the requirement "that the defendant not commit another Federal, *State*, or *local* crime during the term of supervision." 18 U.S.C. 3583(d) (emphases added). Finally, many acts that constitute the "sexually violent conduct" or "child molestation" associated with the relevant statutory definitions of "sexually dangerous" are in fact federal crimes, and there is accordingly no small likelihood that individuals eligible for commitment under Section 4248 would engage in future conduct in violation of federal criminal law.

C. The court of appeals also erred in affirming the dismissal of the civil-commitment proceeding against respondent Catron without articulating any reason that the statute is unconstitutional in cases involving individuals, like him, who have been indicted on federal criminal charges but found to be incompetent to stand trial. The court of appeals acknowledged that civil commitment of such individuals "would lie within [the federal government's] constitutional authority" if it were pursued under Section 4246 (Pet. App. 19a n.10), and did not identify any constitutionally significant difference between Section 4246 and Section 4248. Instead, the court based its decision on its belief that the government failed to point to any basis for treating Catron's case differently from the others. In fact, however, the government specifically argued that Section 4248 would be constitutional as to Catron even under the approach that the court of appeals adopted. See J.A. 56-59, 89-90.

ARGUMENT

CONGRESS MAY PROVIDE FOR THE CIVIL COMMITMENT OF SEXUALLY DANGEROUS PERSONS WHO ARE ALREADY IN FEDERAL CUSTODY BECAUSE THEY HAVE BEEN CONVICTED OF FEDERAL CRIMES OR HAVE BEEN FOUND INCOMPETENT TO STAND TRIAL ON PENDING FEDERAL CHARGES

Section 4248 was enacted to protect against threats posed by the release of federal inmates who suffer from a serious mental illness, abnormality, or disorder and are sexually dangerous to others. The United States' authority over persons lawfully in its custody stands on a different footing than do its powers regarding the general population. In enacting Section 4248, Congress reasonably determined that the initiation of civil-commitment proceedings against a person already in federal custody is an appropriate—and therefore necessary and proper—component of Congress's unquestioned power to enact criminal laws prohibiting conduct within the scope of its Article I powers, to operate a federal penal system for the punishment of offenses under those laws, and to place persons convicted of or pending trial for violating those laws in federal custody.

A. Section 4248 Appropriately Furthers The Discharge Of The Custodial Powers And Responsibilities Arising From Congress's Undisputed Authority To Establish A Federal Penal System

The Necessary and Proper Clause vests in Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. Art. I, § 8, Cl. 18. The Necessary and Proper Clause gives Congress "discretion" to choose the "means by which the powers [the Constitution] confers are to be carried into execution," so long as those means are "appropriate" and "not prohibited," and so long as the end they serve is "legitimate" and "within the scope of the [C]onstitution." *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). The clause thus ensures Congress's ability to legislate on a "vast mass of incidental powers." *Id.* at 420-421. And when Congress legislates in furtherance of a legitimate end, its choice of means is accorded broad deference. See *Sabri* v. *United States*, 541 U.S. 600, 605, 609 (2004) (explaining that *M'Culloch* established "review for means-ends rationality under the Necessary and Proper Clause"); see also *Jinks* v. *Richland County*, 538 U.S. 456, 462 (2003) ("[W]e long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be '*absolutely* necessary' to the exercise of an enumerated power."); *Burroughs* v. *United States*, 290 U.S. 534, 547-548 (1934) ("If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.").

Pursuant to its power under the Necessary and Proper Clause, Congress has carried into execution various of its enumerated powers—*e.g.*, to lay and collect taxes, to regulate interstate commerce, to establish post offices, to make rules for the regulation of the armed forces, and to exercise jurisdiction over the District of Columbia and federal territories and enclaves, U.S. Const. Art. I, § 8, Cls. 1, 3, 7, 14 and 17—by enacting criminal statutes prohibiting and punishing certain conduct. See *M'Culloch*, 17 U.S. (4 Wheat.) at 416-418 (locating Congress's power to punish most federal crimes in the Necessary and Proper Clause). Those powers encompass the ability to imprison or otherwise provide for the custody or supervised release of indicted or convicted offenders. The authorization of judicial proceedings for the civil commitment of a person who has come into the custody of the United States for violation of federal criminal laws, when such a person is mentally ill and dangerous, is a rational incident to Congress's Article I powers to enact criminal laws, provide for the operation of a penal system, and assume for the United States custodial responsibilities for its prisoners. Thus, that authorization too is within Congress's powers.

1. *The federal government has long exercised civil-commitment powers over individuals with whom it has a special relationship*

Although a general power of civil commitment is one component of the States' police powers or *parens patriae* powers, civil commitment is not forbidden to the federal government. Indeed, civil-commitment authority over certain persons has long been regarded as properly incident to the exercise of various federal powers. When the United States assumes special authority over or responsibility for an individual, it may also assume an obligation to protect both the individual and the public from the risk of harm resulting from that person's mental illness.

a. Numerous federal statutes have provided for the custody and treatment of mentally ill persons in whom the federal government has a special interest. In 1855, Congress established a government hospital in Washington, D.C.—later named "Saint Elizabeths Hospital"[8]—in order to provide "the most humane care and enlightened curative treatment of the insane of the army and navy of the United States, and of the District of Columbia." Act of Mar. 3, 1855, ch. 199, 10 Stat. 682. That statute provided for the hospital to receive insane persons belonging to the Army or Navy, under order of the Secretary of War or the Secretary of the Navy, as well as indigent insane persons residing in the District of Columbia. *Id.* §§ 4 and 5, 10 Stat. 682, 683. With regard to military personnel, the authority to assume custody was later extended not only to active members of the armed forces, but also to indigent recent retirees who had become insane "from causes which arose during and were produced by [military] service." Act of July 13, 1866, ch. 179, § 2, 14 Stat. 94.

Additional statutes similarly provided for federal custody and treatment of other categories of insane persons with whom the federal government had some special relationship—*e.g.*, Foreign Service personnel and overseas employees of the Foreign Service adjudged insane in a foreign country, inmates of federal institutions like the Soldiers' Home and the National Home for Disabled Volunteer Soldiers, beneficiaries of the Bureau of Indian Affairs, and United States citizens adjudged insane in Canada, the Panama Canal Zone, or the Virgin Islands.[9] Most of those statutes have been replaced with general laws providing for the hospitalization of mentally ill U.S. nationals returned from foreign countries, see 24 U.S.C. 321-329, or for the use of the District of Columbia's mental-health system to provide services (at federal expense) to "individuals entitled to mental health services under Federal law." 24 U.S.C. 225(a)(5)(i) and 225g(b); see 24 U.S.C. 225(a)(4)(iv) (recognizing the role of Saint Elizabeths since 1855 in providing "patient care and related services for designated classes of individuals entitled to mental health benefits under Federal law, such as certain members and employees of the United States Armed Forces and the Foreign Service, and residents of American overseas dependencies").

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[8] See Act of July 1, 1916, ch. 209, 39 Stat. 309.

The original federal statutes providing for commitment of certain categories of mentally ill persons were understood as vindicating responsibilities the government owed both to the committed individuals and to the public. The District of Columbia Circuit observed in *White* v. *Treibly*, 19 F.2d 712 (1927), in upholding the government's statutory authority to commit a retired naval officer, that the individual maintained connections with the Navy while in retired status and his "care and protection" were a "concern and duty of the government." *Id.* at 713; see also *Government Hosp. for the*

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[9] See 24 U.S.C. 191a (1946) (repealed 1960); 24 U.S.C. 194 (1925) (repealed 1984); 24 U.S.C. 195 (1925) (repealed 1984); 24 U.S.C. 195a (1952) (repealed 1984); 24 U.S.C. 196 (1925) (repealed 1984); 24 U.S.C. 196a (1934) (repealed 1960); 24 U.S.C. 196b (1940) (repealed 1984); 42 U.S.C. 222 (1946) (repealed 1984).

Insane, 17 Op. Att'y Gen. 211, 212-213 (1881) (referring to the "duty of the United States to take care of convicts who may become insane while in her custody") (emphasis omitted).

Other decisions affirmed the government's responsibility to protect the public as an incident of its other statutory responsibilities. In *De Marcos* v. *Overholser*, 122 F.2d 16 (D.C. Cir.), cert. denied, 314 U.S. 609 (1941), the court of appeals considered the application of a statute authorizing the Secretary of the Interior, upon the application of the Secretary of State, to transfer to Saint Elizabeths Hospital any United States citizen legally adjudged insane in Canada when residence in a State, a territory, or the District of Columbia could not be established. See Act of Mar. 2, 1929, ch. 509, 45 Stat. 1495 (24 U.S.C. 196a (1934)). In denying the petition for release of a detainee held pursuant to that statute, the court observed that Tennessee, the State to which the detainee sought to be transferred, appeared from the record to be unwilling to accept him, and that therefore the result of "granting his petition would be to set at large a person found in the District of Columbia to be of unsound mind and who had previously been convicted of a serious crime." *De Marcos*, 122 F.2d at 17. The court declared:

> This country, having accepted petitioner from the Canadian Government as an insane citizen of the United States and the court having upon a hearing found him to be incapable of taking care of himself, had the duty to confine him in one of its own institutions for his own safety and for the protection of the public until he could be transferred to one in the state of his residence[.]

Ibid. The court explained that, because there appeared to be no State to which the petitioner could be transferred, he would need to be kept at the federal facility "until cured of his mental disease." *Ibid.*; see also *Howard* v. *Overholser*, 130 F.2d 429, 432 (D.C. Cir. 1942) (holding that an inmate at Saint Elizabeths could not obtain a transfer to his State of legal residence "without regard to its willingness to receive him," because the statute contemplated that transfer would be made only if the inmate could be "delivered into the hands of the state officials who are charged with the custody of its insane residents").

b. Shortly after establishing a federal hospital for the insane of the military and the District of Columbia, Congress recognized that a similar civil-commitment authority was a necessary adjunct to the federal government's role as the operator of a penal system. In 1857, Congress authorized the confinement of "any person, charged with [a federal] crime, * * * found * * * to be an insane person," or "[a]ny person becoming insane during the continuance of his sentence in the United States penitentiary." Act of Feb. 7, 1857, ch. 36, §§ 5 and 6, 11 Stat. 158. Although that provision was sometimes construed as limited to persons charged in the District of Columbia (see *Government Hosp. for the Insane*, 17 Op. Att'y Gen. at 212-213; but see J.A. 71), later statutes provided for the commitment not only of federal convicts who became insane while imprisoned (without regard to where they were imprisoned), but also of persons who had been charged with federal offenses, so long as they were "in the actual custody of [federal] officers." Act of June 23, 1874, ch. 465, § 1, 18 Stat. 251; Act of Aug. 7, 1882, ch. 433, 22 Stat. 330.

As noted above (see p. 3, *supra*), those statutes were not used to hold prisoners in federal custody past the end of their original criminal sentences, because they contained no procedures to authorize such extended detention. But that gap was filled in 1949, when Congress enacted more comprehensive legislation dealing with the civil commitment of persons in federal custody for criminal prosecution or punishment.[10] As discussed above (see pp. 3-4, *supra*), that legislation was based on the recommendations of the Judicial Conference of the United States, the proposals of which were the "product of a long study, by a committee of the Judicial Conference * * * working in close cooperation with representatives of the Department of Justice, of the problem of the care and custody of insane persons charged with or convicted of offenses against the United States." H.R. Rep. No. 1319, 81st Cong., 1st Sess. 1 (1949) (*1949 House Report*); see also *Greenwood* v. *United States*, 350 U.S. 366, 373 (1956) (noting that the bill was proposed "after long study by a conspicuously able committee, followed by consultation with federal district and circuit judges").

The committee of the Judicial Conference had found that there were many cases in which the lack of federal procedures for the ongoing custody of certain dangerous and mentally ill persons in federal custody based on criminal charges or convictions was deeply problematic, because States were not always willing to assume responsibility for persons "who would be a menace to be left at large." *Care and Custody of Insane Persons Charged With Federal Offenses: Hearing Before a Subcomm. of the Senate Comm. on the Judiciary*, 80th Cong., 2d Sess. 5 (1948) (*1948 Senate Hearing*) (statement of Judge Magruder, chairman of the Judicial Conference Committee); see also J.A. 67-69, 73-74.

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[10] See Act of Sept. 7, 1949, ch. 535, 63 Stat. 686 (18 U.S.C. 4244-4248 (1952)). Those provisions—together with 18 U.S.C. 4241-4243 (1952), which had recodified earlier provisions, see Act of June 25, 1948, ch. 645, 62 Stat. 855—were revised and reorganized in 1984. See Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 403(a), 98 Stat. 2057-2065 (18 U.S.C. 4241-4247).

Congress responded by enacting comprehensive legislation "virtually identical with that approved by the Judicial Conference." *United States* v. *Alvarez*, 519 F.2d 1036, 1043 (3d Cir. 1975). The legislative history repeatedly articulated the same concerns about the dangers associated with releasing mentally ill individuals whom the States would not themselves commit. As the superintendent of Saint Elizabeths had succinctly explained during the Senate hearings:

> It sounds very simple to say that a man's term has expired, you shall send him back to the State he came from, but not all States are complacent about allowing to be returned Federal prisoners who are alleged to be residents of that State[.]
>
> [Y]ou may fall into a situation in which a prisoner might be a menace to the community if he were not kept under Federal control.

1948 Senate Hearing 14.[11] The House Report further observed that requiring the release of such persons upon completion of their terms of imprisonment could place an "unfair burden upon the community where release [wa]s effected" (which was generally the place of conviction). *1949 House Report* 2 (quoting BOP Director Bennett).

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[11] See also, *e.g.*, *1949 House Report* 2 (noting the need to address the "appreciable number" of former federal prisoners who are not accepted by state institutions for "lack of legal residence in any State but who ought not, however, to be at large because they constitute a menace to public safety") (quoting statement submitted by James V. Bennett, BOP Director); *ibid*. (referring to the "need for specific statutory authority to deal with those cases * * * where [a] mental condition exists upon expiration of sentence, with no constituted authorities able or willing to assume custody, and outright release would be incompatible with

The new statute expressly addressed persons whose prison terms were expiring or who could not be tried because of their mental condition. For an individual in either of those categories, it authorized a federal court to conduct a hearing concerning the individual's mental condition and to "commit him to the custody of the Attorney General until restored to sanity, or sufficiently improved to remove any danger, or accepted by State authorities for safe custody." *1949 House Report* 2-3. The statute also set out a procedure for determining competency to stand trial (including a post-conviction proceeding to determine competency of prisoners whose mental incompetency had not been disclosed at trial), and provided for the commitment of persons found incompetent pursuant to those procedures. Act of Sept. 7, 1949, ch. 535, 63 Stat. 686 (18 U.S.C. 4244-4248 (1952)).

2. The federal government's custodial role over persons charged with or convicted of federal crimes justifies steps to protect them and the public from potential harm caused by their mental illness

As the background of the 1949 statute makes clear, Congress recognized that the exercise of federal custody

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public safety"); S. Rep. No. 209, 81st Cong., 1st Sess. 2 (1949) ("A most serious problem arises, however, when the legal residence of an insane prisoner cannot be determined or when the State authorities refuse to accept custody or fail to accord him proper care and treatment.") (quoting letter from Peyton Ford, Assistant to the Attorney General).

alters the relationship of the government to an individual, conferring upon the government a greater degree of authority over the inmate himself and the management of his relationship to society. Having assumed plenary control over and responsibility for an inmate, the federal government becomes obliged to consider the implications of terminating physical custody. In furtherance of the government's custodial role, it is appropriate to take steps to mitigate significant dangers to the public that might follow from the release of an inmate with a serious mental condition. Decades of case law concerning Section 4246 support the proposition that Congress operates within the sphere of its legitimate authority when it provides for such steps in conjunction with the government's custodial role in operating the federal penal system.

a. Civil commitment beyond the term of a prison sentence serves two general purposes necessary and proper to the operation of the prison system, which is unquestionably within the authority of Congress to establish for the punishment of crimes falling within its Article I powers. The first of those purposes is to meet responsibilities to the inmate, including for psychiatric treatment, incurred when the federal government removes him from society. As courts of appeals have observed in addressing civil commitment under 18 U.S.C. 4246, the government's role in that setting "is not that of punitive custodian of a fully competent inmate, but benign custodian of one legally committed to it for medical care and treatment—specifically for psychiatric treatment." *United States* v. *Steil*, 916 F.2d 485, 488 (8th Cir. 1990) (quoting *United States* v. *Charters*, 863 F.2d 302, 312 (4th Cir. 1988), cert. denied, 494 U.S. 1016 (1990)).

Second, civil commitment protects against the release of a person in government custody whose mental condition is known to pose a danger to the public. A primary purpose of commitment statutes is "to avert the public danger likely to ensue from the release of mentally ill and dangerous detainees"; and, in applying those statutes, courts assume "an awesome responsibility to the public to ensure that a clinical patient's release is safe." *United States* v. *S.A.*, 129 F.3d 995, 999 (8th Cir. 1997) (citation omitted) (applying Section 4246 to authorize indefinite commitment of a juvenile offender beyond his scheduled release date), cert. denied, 523 U.S. 1011 (1998). The statutes thus reflect the understanding—also embodied in the common law—that a custodian properly assumes responsibilities to third parties when he takes charge of a person who is likely to cause harm if not controlled. See Restatement (Second) of Torts § 319 (1965) ("One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."). Cf. *Hinckley* v. *United States*, 163 F.3d 647, 656 (D.C. Cir. 1999) (noting that that principle provides strong incentives for mental hospitals to act responsibly in deciding whether to authorize their patients' releases); *Smith* v. *Hope Vill., Inc.*, 481 F. Supp. 2d 172, 197-199 (D.D.C. 2007) (holding that the duty is not extinguished upon an inmate's release from a facility).[12]

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[12] See also *Lipari* v. *Sears, Roebuck & Co.*, 497 F. Supp. 185, 190 n.5 (D. Neb. 1980) (explaining that Section 315 of the Restatement sets out the "special relationship" that may give rise to a "duty to control the conduct of a third person" and that following sections, including Section

b. This Court in *Greenwood* v. *United States*, 350 U.S. 366 (1956), addressed a statutory provision pertaining to both a short-term civil commitment based on incompetency to stand trial and a potentially longer term of commitment based on findings of mental illness and dangerousness. The provision then codified at Section 4246 (the predecessor to 18 U.S.C. 4246 as it stands today) provided that persons like Greenwood who were indicted on federal charges but incompetent to stand trial could be civilly committed "until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law." 18 U.S.C. 4246 (1952); see *Greenwood*, 350 U.S. at 368 n.2. Under the terms of the statute, those persons could also be subjected to the same commitment provisions that applied to convicted prisoners reaching the end of their sentences, which provided for longer-term commitment on the basis of mental illness and dangerousness. See *id.* at 373-374 (explaining that 18 U.S.C. 4246 (1952) provided for the application of 18 U.S.C. 4247 and 4248 (1952) to an individual like Greenwood, who had not yet been tried).

In *Greenwood*, the Court upheld—as "plainly within congressional power under the Necessary and Proper Clause"—the continued commitment under Section 4246 of a person charged with but incompetent to be tried for a federal offense, upon a finding that he satisfied the conditions then specified in Section 4247. 350 U.S. at 375. The Court did so even though it recognized that, in view of the individual's medical condition, there was "little likelihood" that a federal criminal trial would ever

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319. "present specific examples of special relationships giving rise to an affirmative duty").

take place. *Id.* at 375; see also *id.* at 372 (psychiatric report concluded that Greenwood "will probably require indefinite hospitalization to insure his own safety and that of society"). Although the Court cautioned that it was deciding "no more than the situation before us presents" and thus did not "imply an opinion on situations not now before us," it nevertheless held that, in the absence of certainty that "the power that put [Greenwood] into [federal] custody * * * [had been] exhausted," Congress retained a "constitutional power of commitment." *Id.* at 375, 376.

In reaching that conclusion, the Court affirmed a decision of the Eighth Circuit, and rejected decisions of the Ninth and Tenth Circuits that had held the federal government to lack authority to commit an incompetent pretrial detainee who would apparently never be tried because of his mental condition. Compare *Greenwood* v. *United States*, 219 F.2d 376, 387 (8th Cir. 1955) (en banc) ("The national government has the undoubted right to define federal crimes; to provide for the administration and enforcement of its criminal laws; to prescribe the penalties which will be incurred by those violating them; to furnish institutions where such violators can be confined; and generally to do whatever reasonably and lawfully can be done to protect society against such offenders."), aff'd, 350 U.S. 366 (1956), with *Higgins* v. *United States*, 205 F.2d 650 (9th Cir. 1953), abrogated by *Greenwood*, 350 U.S. at 375, and *Wells* v. *Attorney Gen.*, 201 F.2d 556 (10th Cir. 1953), abrogated by *Greenwood*, 350 U.S. at 375.[13]

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[13] The *Greenwood* Court's reference to an "unexhausted" power to prosecute echoed the language of the dissenting opinion in the Tenth Circuit's decision in *Wells*, which had explained that "when the federal government has taken one into lawful custody, under the exercise of

In this case, the court of appeals' analysis turned on its view that indefinite commitment was authorized in *Greenwood* only because the respondent had been indicted but not convicted of a federal crime. Pet. App. 18a-20a. Citing the observation in *Greenwood* that the commitment power at issue was "auxiliary to" the government's unexhausted "power to prosecute," 350 U.S. at 375, the court of appeals concluded that the power to commit a person on the basis of his mental condition and dangerousness was upheld solely as a means of protecting the possibility of a future prosecution. Pet. App. 18a-20a.[14]

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valid power, charged with the responsibility of exhausting its jurisdiction over the subject matter as well as the person," the government also assumes a "duty to adequately care and provide for" that person if he is found to be insane. *Wells*, 201 F.2d at 561 (Huxman, J., dissenting).

[14] The district court suggested (Pet. App. 37a & n.7) that *Greenwood* could also be distinguished from this case because the commitment statute upheld there required a "potential harm to the 'interests of the United States,'" while Section 4248 includes no specific reference to federal interests. When *Greenwood* was decided, the statute referred to a finding that a prisoner's release would "probably endanger the safety of the officers, the property, or other interests of the United States." 18 U.S.C. 4247 (1952). Although this Court did not elaborate on that statutory reference, see *Greenwood*, 350 U.S. at 375, later cases construed the statute as authorizing commitment when "release would endanger the safety of persons, property or the public interest in general—not merely the interests peculiar to the United States as such." *United States* v. *Curry*, 410 F.2d 1372, 1374 (4th Cir. 1969) (citing *Royal* v. *United States*, 274 F.2d 846, 851-852 (10th Cir. 1960)). As amended in 1984, Section 4246 is consistent with that broader understanding of federal interests. See 18 U.S.C. 4246(a) (referring to a finding that "release would create a substantial risk of bodily injury to another person or serious damage to property of another"); Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 403(a), 98 Stat. 2063.

The court of appeals' conclusion misperceives the basis for civil commitment and overlooks the way this Court has described the statutory provisions at issue in *Greenwood*. As this Court subsequently explained in *Jackson* v. *Indiana*, 406 U.S. 715, 732-733 (1972), the commitment procedures reviewed in *Greenwood* comported with due process because they were linked to a finding of dangerousness, not just of incompetence to stand trial. The Court in *Jackson* noted that indefinite commitment based solely on mental incompetence likely would not survive constitutional scrutiny. *Ibid.* But, as the Court explained, *Greenwood* did not approve indefinite commitment on that basis. Rather, the *Greenwood* Court had held that commitment was proper under the same provision (and thus the same procedures and conditions) applicable "to those about to be released from sentence." *Jackson*, 406 U.S. at 732. "Accordingly," the *Jackson* Court stressed, "Greenwood was entitled to release when no longer dangerous * * * even if he did not become competent to stand trial[.]" *Ibid.* (citing *Greenwood*, 350 U.S. at 374).

Applying that principle, this Court and others have recognized that the indefinite civil commitment of a mentally incompetent person who has been charged with a federal offense, or one who has been acquitted on the basis of mental illness, must be based on a showing of mental illness and dangerousness—a basis that applies equally to a convicted prisoner who is otherwise due for release. See, *e.g.*, *Jones* v. *United States*, 463 U.S. 354, 368-369 (1983) (holding that an insanity acquittee may be detained indefinitely, without regard for the "acquittee's hypothetical maximum sentence," because no "correlation between severity of the offense and length of time necessary for recovery" is required; noting that ongoing civil commitment "rests on [a detainee's] continuing illness and dangerousness"); *United States* v. *DeBellis*, 649 F.2d 1, 3 (1st Cir. 1981) (holding that the ongoing and indefinite commitment of a defendant could be justified only by a finding that he posed a danger to himself or others by reason of his mental illness).

Similarly, in *United States* v. *Sahhar*, 56 F.3d 1026, cert. denied, 516 U.S. 952 (1995), the Ninth Circuit rejected an equal protection challenge to the "potentially indefinite commitment" under 18 U.S.C. 4246 of a defendant judged incompetent who had already been committed for a period longer than the maximum penalty for the charged offenses. 56 F.3d at 1028-1029. The court observed that "civil commitment of a dangerous and mentally ill person [was justified] because he was in *federal* custody, not because he was in *pretrial* custody. The fact that an indictment is no longer in place is irrelevant to the governmental interests at stake." *Id.* at 1029. The court identified the federal government's "substantial" interests in "treating Sahhar's mental illness and protecting him and society from his potential dangerousness," *id.* at 1028, 1029, and concluded that—as in *Jones*—the defendant's "confinement rest[ed] on his continuing illness and dangerousness." *Sahhar*, 56 F.3d at 1029 (quoting *Jones*, 463 U.S. at 369).

Under the court of appeals' decision in this case (Pet. App. 18a-20a), the federal government would have had no interest at all in the continued commitment of the insanity acquittees in *Sahhar* and *DeBellis*, because its prosecutorial powers would, by definition, have been exhausted upon acquittal. But—consistent with the special responsibilities that arise from the government's custody over mentally ill persons who pose a danger to themselves or the public—neither the acquittees in those cases nor the courts ruling on their challenges even suggested that civil commitment in the circumstances present there would violate Article I.

c. Even outside the context of mental illness, the federal government often has a direct interest in the activities of recently released federal prisoners. A period of incarceration of more than 12 months is generally followed by a period of supervised release. See 18 U.S.C. 3583, 3624; see also Sentencing Guidelines § 5D1.1(a) (a sentencing court "shall order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than one year is imposed, or when required by statute"). Indeed, terms of supervised release were included in the sentences of respondents Comstock, Matherly, Vigil, and Revland. Pet. App. 24a, 25a n.2.

The conditions associated with supervised release routinely extend beyond the kinds of regulations that the federal government could impose on members of the general population; they include, for example, the requirement "that the defendant not commit another Federal, *State*, or *local* crime during the term of supervision." 18 U.S.C. 3583(d) (emphases added). A violation of those conditions can result in revocation of supervised release and a return to federal prison. 18 U.S.C. 3583(e)(3). Although the terms of supervised release are authorized as part of the original criminal sentence and do not depend on any additional civil-commitment authority, they underscore the federal government's distinct relationship with prisoners convicted of federal crimes, as well as its ability to take special measures to protect the public from harm that might result upon these prisoners' release, even when that harm might arise from conduct that is otherwise beyond the general regulatory powers of the federal government.

3. Section 4248 serves the same legitimate ends as prior federal civil-commitment statutes

Against this historical background, Section 4248 is correctly understood as a modest expansion of a settled framework for federal civil commitment of dangerous mentally ill persons in federal custody. Section 4248, like the entire framework of which it is a part, adopts appropriate means related to Congress's power to establish a penal system and assume custodial responsibilities over those charged with or convicted of federal offenses.

In the 1990s, in response to "the problem of managing repeat sexual offenders" (*Kansas* v. *Hendricks*, 521 U.S. 346, 350 (1997)), States began to adopt civil-commitment statutes specifically tailored to individuals with mental disorders that made them likely to engage in sexually violent acts. By 2005, Congress was also considering how to amend and supplement the pre-existing framework for federal civil commitment (18 U.S.C. 4241-4247) as part of its efforts to "to address the growing epidemic of sexual violence against children." H.R. Rep. No. 218, 109th Cong., 1st Sess. Pt. 1, at 20 (2005). Like the similar state legislation, the resulting Adam Walsh Act created a form of civil commitment specifically focused on individuals with a mental illness, abnormality, or disorder that made them sexually dangerous. 18 U.S.C. 4248(a). And, like the federal provisions enacted in the 1940s, the Adam Walsh Act targeted federal prisoners who "ought not * * * to be at large because they constitute a menace to public safety" but whom state institutions will not accept. *1949 House Report* 2 (quoting BOP Director Bennett).

Indeed, for all purposes of constitutional analysis relevant here, Section 4248 parallels Section 4246, which provides for the civil commitment of a prisoner or incompetent accused suffering "from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another." 18 U.S.C. 4246(a). Like Section 4246, Section 4248 provides for civil commitment until the individual in question is sufficiently improved to avoid being a danger or until state authorities are willing to accept custody over him. Compare 18 U.S.C. 4248(d)(1)-(2) (federal treatment lasts until a State "will assume * * * responsibility" or the person "is no longer sexually dangerous to others"), with 18 U.S.C. 4246(d)(1)-(2) (federal treatment lasts until a State "will assume * * * responsibility" or the person can be released without creating "a substantial risk of bodily injury to another person or serious damage to property of another"). Like Section 4246, Section 4248 was tailored to particular concerns associated with the federal government's role as the operator of a criminal justice and penal system.

Moreover, the concerns addressed by Congress in enacting Section 4246 remain at least as significant in supporting Section 4248 today. With the expansion of federal criminal law, the federal government has become responsible for a larger number of federal prisoners, who may be incarcerated for extended periods and in far-flung locations.[15] The period of incarceration severs, at least temporarily and in some cases permanently, the prisoner's direct connection to earlier places of residence (which may not always rise to the level of legal domicile). As was the case in the 1940s, a federal prisoner, upon release, is typically returned to his former place of residence or the place in which he was convicted. See 18 U.S.C. 3624(d)(3). And as in the 1940s, there can be no assurance that a State will be willing or able to assume responsibility for a person upon his release from federal prison—particularly a person with whom the State may have had only limited connections and who might thus be likely to travel to, and pose a threat to the public in, other States.

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[15] The federal government prosecutes and takes custody of prisoners on behalf of the Nation, placing them in federal facilities that may be far from and unrelated to any prior place of residence. See 18 U.S.C. 3621(b) (authorizing BOP to "designate the place of the prisoner's imprisonment"); Federal Bureau of Prisons, U.S. Dep't of Justice, *Pro-*

In finding an absence of constitutional authority to enact such legislation, the court of appeals gave no weight to the responsibilities the United States assumes as the custodian of prisoners in the criminal-justice system. Instead, the court mistakenly rejected as "novel" the proposition that the power to civilly commit a mentally ill and dangerous federal convict beyond his term of criminal incarceration may be necessary and proper to the government's authority to administer a criminal-justice and prison system. Pet. App. 13a.

Because the court of appeals believed that respondents' status as federal inmates was irrelevant to its constitutional analysis (Pet. App. 13a-15a), it addressed the validity of Section 4248 as if federal civil commitment authority were being asserted over members of the general population. As explained below, proceeding

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gram Statement 5100.08 (Sept. 9, 2006) (outlining classification system used in deciding which facilities are appropriate for an inmate). Pursuant to 18 U.S.C. 3621(f)—which was added by § 622 of the Adam Walsh Act, 120 Stat. 634—BOP has established sex-offender management and treatment programs at one facility in each of its six regions.

on that erroneous premise, the court concluded that this case is not meaningfully distinguishable from *United States* v. *Morrison*, 529 U.S. 598 (2000): in holding Section 4248 unconstitutional, it was sufficient, in the court of appeals' view, to conclude that the federal government has no general authority to regulate sexually violent conduct or child molestation. Pet. App. 10a-11a, 15a-17a.

The court of appeals' reasoning marks a sharp and unwarranted break with the longstanding recognition that the federal government's relationship with federal prison inmates or those charged with federal offenses creates interests and responsibilities that would not exist if they had not come into federal custody—and that some of those interests and responsibilities should not terminate automatically at the close of a prison term.

B. Because Section 4248 Is Limited To Persons Already In Federal Custody, It Does Not Inappropriately Intrude On The States' Police Powers

1. The court of appeals relied extensively on this Court's decisions in *Morrison* and *United States* v. *Lopez*, 514 U.S. 549 (1995), which invalidated federal statutes on the ground that they appeared to grant limitless powers to the federal government and would have erased the distinctions between state and federal regulatory spheres. Thus, the court of appeals concluded that, "[a]t its core, the Government's argument [in defense of Section 4248] attempts to * * * 'convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.'" Pet. App. 17a (quoting *Lopez*, 514 U.S. at 567). The court also stated that Section 4248 "would encroach on the police and *parens patriae* powers reserved to the

sovereign [S]tates, conflating 'what is truly national and what is truly local.'" *Id.* at 12a (quoting *Morrison*, 529 U.S. at 617-618). Those concerns, however, are unfounded. In fact, the ways in which this case differs from *Lopez* and *Morrison* help to demonstrate that Section 4248 does not deploy means that are "prohibited" or otherwise inconsistent "with the letter and spirit of the constitution." *M'Culloch*, 17 U.S. (4 Wheat.) at 421.

In both *Lopez* and *Morrison*, this Court stressed that the statutes under review provided no assurance that the conduct to be regulated in an individual case—either the knowing possession of a firearm within 1000 feet of a school, or a crime of violence motivated by gender—had any direct, as opposed to attenuated, connection with a proper subject of federal regulation. See *Lopez*, 514 U.S. at 563-567; *Morrison*, 529 U.S. at 612-613. As the Court explained, neither statute contained a "jurisdictional element which would ensure, through case-by-case inquiry," that the conduct in question affected interstate commerce. *Lopez*, 514 U.S. at 561; see also *Morrison*, 529 U.S. at 613. In the absence of any such statutory element or other limiting principle, the Court found itself "hard pressed to posit any activity by an individual" that would be beyond the federal government's regulatory powers, and determined that invalidation of the statutes was necessary to preserve the Constitution's "distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 564, 567-568; see also *Morrison*, 529 U.S. at 615, 617-618.

Section 4248 does not present the problems identified in *Lopez* and *Morrison*. The statutory text includes a form of the jurisdictional element that was missing in each of those cases. Rather than authorizing civil commitment of "any person" who is found to be sexually dangerous, Section 4248(a) applies only to individuals who are already "in the custody of the Bureau of Prisons" or "committed to the custody of the Attorney General pursuant to [S]ection 4241" or "against whom all criminal charges have been dismissed * * * for reasons relating to the [person's] mental condition." As a result, there is nothing attenuated about the connection between the federal government and the persons to whom Section 4248 may be applied. By limiting the statute's applicability to a subset of persons who are already in federal custody, Congress has respected the distinction between the national and the local, and refrained from asserting anything like "a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.[16]

2. Of course, the direct connections that exist between the federal government and individuals in its custody do not preclude a State from having its own concurrent interest in, for example, a federal inmate who is one of its residents. But Section 4248 accommodates those concurrent interests and does so without violating "the etiquette of federalism." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). Under the section, Congress does not *direct* any State to take responsibility for someone

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[16] The connection between the federal government and persons who are already in its custody is closer than the connection that was held to satisfy the Necessary and Proper Clause in *Sabri* v. *United States*, 541 U.S. 600 (2004). There, the Court upheld a federal prosecution for attempts to bribe a local official, even though such crimes were "in an area historically of state concern." *Id.* at 608 n.* The Court did not require there to be a direct connection between federal funds and the subject of the bribes. See *id.* at 605-608. Instead, the Court found it sufficient that the corrupt transactions were intended to influence an agent of an entity that had received more than $10,000 in federal benefits in a one-year period. See *ibid.*; 18 U.S.C. 666(a)(2) and (b).

in the federal government's custody. Cf. *Printz* v. *United States*, 521 U.S. 898, 925-933 (1997). Instead, the legislation requires the Attorney General to make "reasonable efforts to cause" the State "in which [a] person is domiciled or was tried" to "assume responsibility for his custody, care, and treatment." 18 U.S.C. 4248(d). As a result, States are free to choose whether to "assume such responsibility," and federal custody under Section 4248 will cease whenever a State chooses to do so.[17] *Ibid.*

Respondents argued below (Resp. C.A. Br. 32-35) that Section 4248's procedure for allowing a State to assume responsibility is constitutionally infirm because it provides that option only after a federal court has held a hearing to determine whether the person is "sexually dangerous." 18 U.S.C. 4248(d). They contrasted that provision with Section 4246, which prescribes the same procedures after a commitment hearing for the Attorney

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[17] The statute does not permit a State both to refuse responsibility for a person subject to Section 4248 and to strip the federal government of its powers over that person, but that is unremarkable. The boundaries of Congress's Article I powers do not expand or contract on the basis of States' acquiescence or objection. See, *e.g.*, *Gonzales* v. *Raich*, 545 U.S. 1, 29 (2005) ("Just as state acquiescence to federal regulation cannot expand the bounds of the Commerce Clause, so too state action cannot circumscribe Congress' plenary commerce power.") (citation omitted).

Moreover, this Court's decision in *Greenwood* establishes that a State's decision that one of its residents should not be committed does not prevent the federal government from seeking commitment of that person. In *Greenwood*, the petitioner, an Ohio resident, had initially been transferred to Ohio authorities, who determined that he was not insane and released him. See 350 U.S. at 369, 371. The Court nevertheless sustained the determination in a later federal proceeding that the petitioner was insane and subject to federal civil commitment. *Id.* at 375-376.

General to "make all reasonable efforts to cause" a State to assume responsibility for the person's custody and treatment, 18 U.S.C. 4246(d), but also requires the certificate that initiates a federal commitment proceeding under Section 4246 to state "that suitable arrangements for State custody and care of the person are not available." 18 U.S.C. 4246(a).[18] Respondents have characterized Section 4246 as "recognizing the federalism concerns involved in federal civil commitment" and as containing "appropriate safeguards" that Congress could have used "if it wanted to recognize its constitutional obligation to defer to [S]tates' authority and responsibility." Resp. C.A. Br. 32, 35; see also Pet. App. 19a, 63a-67a. But the existence of federal power does not depend on a State's declination of responsibility—and a State cannot prevent the federal government from retaining custody unless it assumes responsibility itself. See note 17, *supra*. It therefore cannot be of constitutional significance whether the relevant States are consulted before or after the federal government has undertaken to prove in court that a person in federal custody is in fact mentally ill and sexually dangerous. Furthermore, nothing in Section 4248 would prohibit the federal government from acting on an expression of interest by a relevant State in assuming custody before the federal government makes the discretionary decision to initiate proceedings under that section.

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[18] The timing of States' involvement under Section 4248, although different from that used in Section 4246, is not novel. In cases involving a person found not guilty of federal charges by reason of insanity, Section 4243 similarly requires consideration of state arrangements only after the federal court has ordered commitment. See 18 U.S.C. 4243(e). In addition to mimicking that prior example, the sequence in Section 4248 may reflect Congress's recognition that some States are in the process of adopting civil commitment regimes specifically designed to address sexually dangerous persons. The Adam Walsh Act itself encouraged that process, by authorizing the Attorney General to award federal grants to States "for the purpose of establishing, enhancing, or operating effective civil commitment programs for sexually dangerous persons." § 301(a), 120 Stat. 617-618 (42 U.S.C. 16971(a)).

3. Finally, the court of appeals erred in concluding that any interests the federal government has in an individual who is released from federal imprisonment are necessarily overwhelmed by the States' more general regulatory interests. See, *e.g.*, Pet. App. 14a (distinguishing between the "broad powers" the federal government "possesses * * * over persons during their prison sentences," and the lack of "any [federal] authority to regulate future conduct that occurs outside of the prison walls"); *id.* at 15a-16a ("many commitments under [Section] 4248 would prevent conduct prohibited *only* by *state law*").

In the first place, the court of appeals' analysis overlooks the federal government's explicit interest, arising from the conditions of supervised release applicable to most prisoners, of ensuring that individuals it releases will comply with state and local, as well as federal, statutes. See pp. 38-39, *supra*. Moreover, as discussed above (see pp. 36-38, *supra*), the government's interest in preventing future crimes by mentally ill persons in the federal government's custody has never turned on whether future harm to persons or property is more likely to be criminalized by federal law or state law. Indeed, when upholding the constitutionality of pretrial incarceration of persons under federal indictment in *United States* v. *Salerno*, 481 U.S. 739 (1987), this Court found that power was justified by the pendency of certain charges combined with the threat that those individuals posed to public safety, without considering whether they were more likely to violate federal than state law. See *id.* at 747, 750, 755 (referring to Congress's "legitimate" interest in "preventing danger to the community," Congress's interest in preventing "dangerous acts in the community," Congress's concern about a person who "presents a demonstrable danger to the community," "society's interest in crime prevention," and every government's "concern for the safety and indeed the lives of its citizens").

Nevertheless, federal law does criminalize many acts that constitute the "sexually violent conduct" or "child molestation" associated with the definitions of the term "sexually dangerous" in 18 U.S.C. 4247(a)(5) and (6). For example, when acts of sexual abuse occur within the special maritime and territorial jurisdiction of the United States or in Indian Country—as was true of the offenses that caused respondents Vigil and Catron to be in federal custody (Pet. App. 25a n.2)—those acts violate federal criminal law. See, *e.g.*, 18 U.S.C. 2241-2245. So too sexual exploitation of a minor and solicitation of a minor to engage in prostitution or sexual activity, when the Internet or interstate travel is involved, count as federal offenses. See, *e.g.*, 18 U.S.C. 2251.[19]

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[19] Of course, individuals who engage in sexually violent conduct or child molestation—a condition for commitment under Section 4248—are also often likely to commit other types of sex-related crimes subject to federal jurisdiction, such as those involving child pornography on the Internet. See, *e.g.*, *Child Pornography and Pedophilia: Report by the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, S. Rep. No. 537, 99th Cong., 2d Sess. 9 (1986) (discussing the frequency of child pornography use by persons engaged in child molestation, and noting one estimate that more than 50% of arrested child molesters possessed child pornography); Nat'l Ctr. for Missing & Exploited Children, *Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings from the National Juvenile On-*

C. Section 4248's Application To Individuals Charged With Federal Offenses But Found Incompetent To Stand Trial Is Constitutional Even Under The Court Of Appeals' Reasoning

In holding Section 4248 unconstitutional in the case of respondent Catron—who was deemed incompetent to stand trial after being charged with four counts of aggravated sexual abuse of a minor under the age of 12 and one count of abusive sexual contact—the court of appeals inexplicably invalidated an application of the statute that survives scrutiny even under that court's erroneous view of Congress's authority.

As discussed above, the court of appeals erred in reading *Greenwood* as limiting the federal government's civil-commitment authority to persons still under indictment for federal crimes. Yet, even under the court of appeals' own reasoning, Catron, who has not yet been tried on the federal charges against him, could properly be subjected to civil-commitment proceedings under Section 4246, because the government's prosecutorial powers against him have not been exhausted. Indeed, the court expressly acknowledged that a commitment of "Catron pursuant to [Section] 4246 * * * would lie within [the United States'] constitutional authority." Pet. App. 19a n.10.[20] The court nevertheless concluded

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line Victimization Study 16 (2005) (finding significant overlap between child pornography possession and sexual victimization of children); Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice, *Special Report, Federal Prosecution of Child Sex Exploitation Offenders, 2006, NCJ 219412*, at 1-2 (Dec. 2007) (prosecutions for "child sex exploitation" crimes increased on average by 15% per year between 1994 and 2006, largely due to increases in child-pornography offenses).

[20] See also Resp. C.A. Br. 56 ("[T]he federal government's power to prosecute, as described in *Greenwood*, remains solely for Catron. For

that a commitment of Catron under Section 4248 would not be constitutional. In doing so, it did not identify any distinction between Section 4246 and 4248 that would be relevant to its constitutional analysis. Instead, it declared: "Because no party asks us to bifurcate Catron's unique challenge to § 4248, we decline to do so." *Ibid.*

The court of appeals' premise that the government did not separately defend custody under Catron's different circumstances is incorrect. Catron's case was one of five separate cases that the government had appealed and that the court of appeals had consolidated. J.A. 53-54. The government's briefs in the court of appeals included separate discussions of the constitutionality under *Greenwood* of Section 4248 as applied to "individuals, like respondent Catron, found incompetent to stand trial and committed to federal custody under § 4241(d)." J.A. 56 (capitalization modified); see also J.A. 56-59; J.A. 89-90. Thus, the lack of "bifurcat[ion]" for Catron's case (Pet. App. 19a n.10) was not a product of any failure by the government to note the different circumstances of his confinement and to argue that Section 4248 could be constitutionally applied, at a minimum, to him.

The court of appeals thus erred in ordering Catron's case to be dismissed on constitutional grounds without examining whether his civil commitment under Section 4248 would, in fact, be unconstitutional.

[the other] respondents * * * the power to prosecute for the federal offenses that resulted in their current custody is exhausted.").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 4241 provides:

Determination of mental competency to stand trial to undergo postrelease proceedings[1]

(a) MOTION TO DETERMINE COMPETENCY OF DEFENDANT.— At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

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[1] So in original. Probably should be "stand trial or to undergo postrelease proceedings".

(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and

(2) for an additional reasonable period of time until—

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit proceedings to go forward, the defendant is subject to the provisions of sections 4246 and 4248.

(e) DISCHARGE.—When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial or other proceedings. Upon discharge, the defendant is subject to the provisions of chapters 207 and 227.

(f) ADMISSIBILITY OF FINDING OF COMPETENCY.—A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

2. 18 U.S.C. 4246 provides:

Hospitalization of a person due for release but suffering from mental disease or defect

(a) INSTITUTION OF PROCEEDING.—If the director of a facility in which a person is hospitalized certifies that a person in the custody of the Bureau of Prisons whose sentence is about to expire, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for State custody and care of the person are not available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility, until—

(1) such a State will assume such responsibility; or

(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

(e) DISCHARGE.—When the director of the facility in which a person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the person or, on the motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that—

> (1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or
>
> (2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall—
>
> > (A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that

has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

(f) REVOCATION OF CONDITIONAL DISCHARGE.—The director of a medical facility responsible for administering a regimen imposed on a person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

(g) RELEASE TO STATE OF CERTAIN OTHER PERSONS.—If the director of a facility in which a person is hospitalized pursuant to this chapter certifies to the Attorney General that a person, against whom all charges have been dismissed for reasons not related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried for the purpose of institution of State proceedings for civil commitment. If neither such State will assume such responsibility, the Attorney General shall release the person upon receipt of notice from the State that it will not assume such responsibility, but not later than ten days after certification by the director of the facility.

(h) DEFINITION.—As used in this chapter the term "State" includes the District of Columbia.

3. 18 U.S.C. 4247 provides:

General provisions for chapter

(a) DEFINITIONS.—As used in this chapter—

(1) "rehabilitation program" includes—

(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;

(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;

(C) drug, alcohol, and sex offender treatment programs, and other treatment programs that will assist the individual in overcoming a psychological or physical dependence or any condition that makes the individual dangerous to others; and

(D) organized physical sports and recreation programs;

(2) "suitable facility" means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant;

(3) "State" includes the District of Columbia;

(4) "bodily injury" includes sexual abuse;

(5) "sexually dangerous person" means a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others; and

(6) "sexually dangerous to others" with respect a person, means that the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.

(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION.—A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court, except that if the examination is ordered under section 4245, 4246, or 4248, upon the request of the defendant an additional examiner may be selected by the defendant. For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245, the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, 4243, 4246, or 4248 for a reasonable period, but not to exceed forty-five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245, and not to exceed thirty days under section 4242, 4243, 4246, or 4248 upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.

(c) PSYCHIATRIC OR PSYCHOLOGICAL REPORTS.—A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the Government, and shall include—

(1) the person's history and present symptoms;

(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

(3) the examiner's findings; and

(4) the examiner's opinions as to diagnosis, prognosis, and—

(A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

(B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;

(C) if the examination is ordered under section 4243 or 4246, whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another;

(D) if the examination is ordered under section 4248, whether the person is a sexually dangerous person;

(E) if the examination is ordered under section 4244 or 4245, whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility; or

(F) if the examination is ordered as a part of a presentence investigation, any recommendation the examiner may have as to how the mental condition of the defendant should affect the sentence.

(d) HEARING.—At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

(e) PERIODIC REPORT AND INFORMATION REQUIREMENTS.—(1) The director of the facility in which a person is committed pursuant to—

(A) section 4241 shall prepare semiannual reports; or

(B) section 4243, 4244, 4245, 4246, or 4248 shall prepare annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued commitment. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct. A copy of each such report concerning a person committed after the beginning of a prosecution of that person for violation of section 871, 879, or 1751 of this title shall be submitted to the Director of the United States Secret Service. Except with the prior approval of the court, the Secret Service shall not use or disclose the information in these copies for any purpose other than carrying out protective duties under section 3056(a) of this title.

(2) The director of the facility in which a person is committed pursuant to section 4241, 4243, 4244, 4245, 4246, or 4248 shall inform such person of any rehabilitation programs that are available for persons committed in that facility.

(f) VIDEOTAPE RECORD.—Upon written request of defense counsel, the court may order a videotape record made of the defendant's testimony or interview upon which the periodic report is based pursuant to subsection (e). Such videotape record shall be submitted to the court along with the periodic report.

(g) HABEAS CORPUS UNIMPAIRED.—Nothing contained in section 4243, 4246, or 4248 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention.

(h) DISCHARGE.—Regardless of whether the director of the facility in which a person is committed has filed a certificate pursuant to the provisions of subsection (e) of section 4241, 4244, 4245, 4246, or 4248 or subsection (f) of section 4243, counsel for the person or his legal guardian may, at any time during such person's commitment, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be committed. A copy of the motion shall be sent to the director of the facility in which the person is committed and to the attorney for the Government.

(i) AUTHORITY AND RESPONSIBILITY OF THE ATTORNEY GENERAL.—The Attorney General—

(A) may contract with a State, a political subdivision, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this chapter;

(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243, 4246, or 4248;

(C) shall, before placing a person in a facility pursuant to the provisions of section 4241, 4243, 4244, 4245, 4246, or 4248 consider the suitability of the facility's rehabilitation programs in meeting the needs of the person; and

(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter and in the establishment of standards for facilities used in the implementation of this chapter.

(j) Sections 4241, 4242, 4243, and 4244 do not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice.

4. 18 U.S.C. 4248 provides:

Civil commitment of a sexually dangerous person

(a) INSTITUTION OF PROCEEDINGS.—In relation to a person who is in the custody of the Bureau of Prisons, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons relating to the mental condition of the person, the Attorney General or any individual authorized by the Attorney General or the Director of the Bureau of Prisons may certify that the person is a sexually dangerous person, and transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is a sexually dangerous person. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by clear and convincing evidence that the person is a sexually dangerous person, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall place the person for treatment in a suitable facility, until—

(1) such a State will assume such responsibility; or

(2) the person's condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment;

whichever is earlier.

(e) DISCHARGE.—When the Director of the facility in which a person is placed pursuant to subsection (d) determines that the person's condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the person or, on motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person's condition is such that—

(1) he will not be sexually dangerous to others if released unconditionally, the court shall order that he be immediately discharged; or

(2) he will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment, the court shall—

(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the Director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

(f) REVOCATION OF CONDITIONAL DISCHARGE.—The director of a facility responsible for administering a regimen imposed on a person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that he is sexually dangerous to others in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

(g) RELEASE TO STATE OF CERTAIN OTHER PERSONS.—If the director of the facility in which a person is hospitalized or placed pursuant to this chapter certifies to the Attorney General that a person, against whom all charges have been dismissed for reasons not related to the mental condition of the person, is a sexually dangerous person, the Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried for the purpose of institution of State proceedings for civil commitment. If neither such State will assume such responsibility, the Attorney General shall release the person upon receipt of notice from the State that it will not assume such responsibility, but not later than 10 days after certification by the director of the facility.

RESPONDENT'S BRIEF

6

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA

Petitioner,

v.

GRAYDON EARL COMSTOCK, JR., ET AL.

Respondents.

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QUESTION PRESENTED

Whether 18 U.S.C. § 4248, which authorizes indefinite civil commitment by the federal government of (1) "sexually dangerous" persons who are in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences, and (2) "sexually dangerous" persons who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial, exceeds Congress's powers under Article I of the Constitution.

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STATEMENT OF THE CASE

1. **Section 4248.** In 2006, Congress enacted the Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, 120 Stat. 587. Section 302 of the Act authorizes the civil commitment of "sexually dangerous" persons. 18 U.S.C. § 4248. Section 4248 applies to (i) persons in the custody of the Bureau of Prisons (BOP), (ii) persons committed to the custody of the Attorney General under 18 U.S.C. § 4241(d) based on incompetence to stand trial, and (iii) persons against whom all criminal charges have been dismissed for reasons relating to their mental condition. *Id.* § 4248(a).

Civil commitment proceedings under § 4248 are separate from any criminal proceedings as a result of which an individual is serving a sentence in federal prison. A civil commitment proceeding is assigned a new case number, is typically filed in a different district court, and involves a different factfinder (a judge rather than a jury), and a different burden of proof (clear and convincing evidence rather than proof beyond a reasonable doubt), than the initial criminal proceedings. To initiate civil commitment proceedings under § 4248, the Attorney General certifies an individual as a "sexually dangerous person."[1] Certification blocks the release of the person from federal custody for the duration of the § 4248 proceedings. If the government proves by "clear and convincing evidence" that the person "has engaged or attempted to engage in sexually violent conduct or child molestation and . . . is sexually dangerous to others," the person is civilly committed. *See* 18 U.S.C. §§ 4247(a)(5), (a)(6), 4248. After a person has been civilly committed, § 4248 directs the Attorney General to make "all reasonable efforts" to transfer responsibility for the person's custody, care, and treatment to an appropriate state authority. *Id.*[2] Section 4248 authorizes federal confinement for as long as the person remains "sexually dangerous." *Id.*

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[1] A person is deemed "sexually dangerous to others" if the "person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. § 4247(a)(6).

As of the date of the decision below, over 60 individuals had been certified as "sexually dangerous persons" under § 4248 in the Eastern District of North Carolina. With one exception, each of these individuals had already served all (or almost all) of his prison term. Pet. App. 6a n.3.

2. Respondents' Civil Commitments. In November 2006, six days before Respondent Graydon Comstock finished serving a federal prison sentence for possession of child pornography in violation of 18 U.S.C. § 2252(a)(2), the Attorney General certified him as a "sexually dangerous person" under § 4248, blocking his release from prison. Almost three years later, Mr. Comstock remains confined at the Federal Correctional Institute in Butner, North Carolina (FCI-Butner).

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[2] While a State has the option to take responsibility for the custody, care, and treatment of a committed individual, the federal government has the final say over whether to discharge the individual from custody, care, and treatment. 18 U.S.C. § 4248(e); *see also United States v. Husar*, 859 F.2d 1494, 1497 (D.C. Cir. 1988) (discussing the analagous discharge provision of 18 U.S.C. § 4243(f)); *United States v. Denny-Shaffer*, 2 F.3d 999, 1021 n.30 (10th Cir. 1993) (same).

The cases of Respondents Markis Revland, Thomas Matherly, and Marvin Vigil followed a similar course. The government certified each individual as a sexually dangerous person less than a month before he completed his term of imprisonment. Each remains in federal custody at FCI-Butner.

After Respondent Shane Catron was found not competent to stand trial, the government filed a "Certificate of Mental Disease or Defect and Dangerousness" under 18 U.S.C. § 4246. Two months later, the government withdrew the § 4246 certificate and substituted a certificate pursuant to § 4248. Throughout his competency study, the § 4246 certification process, and the initial period of his § 4248 certification, Mr. Catron was hospitalized at the Federal Medical Center in Butner, North Carolina. He is now incarcerated in the segregated housing unit of FCI-Butner.

3. **The District Court's Opinion.** On September 7, 2007, Judge W. Earl Britt of the Eastern District of North Carolina issued an opinion holding § 4248 unconstitutional on two separate grounds.

First, Judge Britt held that § 4248 is not a necessary and proper exercise of congressional authority. Pet. App. 24a. He noted that the congressional powers the government identified – "the power to criminalize and punish certain conduct" and "the power to prosecute" – are not enumerated in the Constitution. *Id.* at 34a. Rather, those powers "are themselves necessary and proper exercises of power premised upon enumerated powers." *Id.* The court concluded that § 4248 could not be justified as a valid exercise of Congress's commerce power because "§ 4248 'contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress's power to regulate interstate commerce.'" *Id.* at 41a (quoting *United States v. Morrison*, 529 U.S. 598, 613 (2000)).

In addressing the government's argument that § 4248 is justified by Congress's power to "prevent criminal conduct," Judge Britt observed that "[t]he federal government simply does not have broad power generally to criminalize sexually dangerous conduct and child molestation." Pet. App. 49a. He stated that "congressional enactment of the federal criminal laws is itself an exercise of power under the Necessary and Proper Clause." *Id.* at 50a. Judge Britt then noted that "[t]he power to criminalize certain circumscribed sexually violent behavior is not an 'enumerated power' upon which to premise the civil commitment of any potentially sexually dangerous persons as a 'necessary and proper' act." *Id.* at 51a. Judge Britt stated that "[c]onstruing the necessary and proper clause in this way would allow Congress to take steps to 'prevent' all kinds of conduct that it has no ability to criminalize in the first place." *Id.*

Ultimately, the court held that "where there is absolutely no nexus between the findings required for commitment under § 4248 and the likelihood that any individual prisoner would commit a federal sex crime, and where the vast majority of sexually violent conduct and child sexual abuse is regulated by state law, and where the commitment of mentally disordered sexually violent individuals is traditionally handled by state governments, the federal government has created a situation in which its commitment efforts are likely to solely prevent the commission of state criminal conduct." *Id.* at 52a.

Second, the court held that the "clear and convincing" standard of proof violates the due process rights of those subject to commitment under the statute. *Id.* at 24a. Relying on this Court's decisions in *In re Winship*, 397 U.S. 358 (1970), and *Addington v. Texas*, 441 U.S. 418 (1979), the court reasoned that "the complete loss of liberty for a potentially indefinite time period through federally-imposed confinement and the undeniable stigma associated with being labeled a 'sexually dangerous person' . . . demand that a committing judge be convinced beyond a reasonable doubt that the individual committed some act on which the label and the indefinite commitment are premised." Pet. App. 79a.

4. **The Fourth Circuit's Opinion.** The Fourth Circuit unanimously affirmed the district court's ruling. *Id.* at 3a. The court stated that "[i]n the exercise of their general police and *parens patriae* powers, the states have long controlled the civil commitment of the mentally ill," and noted that, "[u]nlike the states, the federal government has no general police or *parens patriae* power." *Id.* at 7a-8a.

The court of appeals observed that the United States defended the validity of § 4248 "largely by direct reliance on the Necessary and Proper Clause," even though "that provision, by itself, creates *no* constitutional power." *Id.* at 8a. The provision authorizes a statute only when the government "show[s] that the statute is necessary to achieve ends within Congress's enumerated powers." *Id.* at 9a. The court concluded that § 4248 could not be sustained based on the Commerce Clause, which was the only enumerated power even hinted at by the United States. *Id.* at 9a-12a.

The Fourth Circuit rejected the government's argument that § 4248 was necessary and proper to its ability to establish and maintain a federal criminal justice and penal system. *Id.* at 13a. The court noted that "Congress may establish and run a federal penal system, as necessary and proper to the Article I power (usually the Commerce Clause) relied on to enact federal criminal statutes." *Id.* at 13a-14a. But the court found that "these powers are far removed from the indefinite civil commitment of persons *after* the expiration of their prison terms, based solely on possible future actions that the federal government lacks power to regulate directly." *Id.* at 14a.

The court also rejected the government's argument that § 4248 is a necessary and proper exercise of its power to prevent "sex-related crimes." *Id.* at 15a. The court reasoned that "[c]onsistent with Congress's limited powers," federal statutes regulating sex crimes are limited to those affecting interstate commerce or involving some territorial connection to the United States. *Id.* The court concluded that "[b]ecause most crimes of sexual violence violate state and not federal law, many commitments under § 4248 would prevent conduct prohibited *only* by *state law*," *id.* at 15a-16a (internal footnote omitted), and § 4248 therefore "sweeps far too broadly to be a valid effort to prevent *federal* criminal activity," *id.* at 16a.

Finally, the court rejected the government's argument that the Necessary and Proper Clause justifies § 4248 because it retains the "power to prosecute" all persons in its custody, noting that four of the five Respondents "have stood trial, been convicted, and fully served all federal prison sentences." *Id.* at 19a. Thus, no federal prosecution is being "frustrated," as it was in *Greenwood v. United States*, 350 U.S. 366 (1956). Pet. App. 20a.[3]

The United States petitioned for rehearing en banc, but no judge of the Fourth Circuit called for a poll, and the petition was denied. Pet. App. 96a.

SUMMARY OF THE ARGUMENT

1. The government seeks to defend § 4248 as a constitutional exercise of Congress's power under the Necessary and Proper Clause, but that Clause "is not itself a grant of power." *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960). Instead, it is "a *caveat* that the Congress possesses all the means necessary to carry out" its specifically enumerated powers. *Id.* (emphasis added). Section 4248 does not

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[3] The government did not ask the Fourth Circuit to address the "unique challenge" to § 4248 raised by the fifth Respondent, so the Fourth Circuit declined to do so. *Id.* at 19a n.10. The Fourth Circuit also declined to address whether due process mandates the reasonable doubt standard for the factual determination. Pet. App. 4a n.1.

carry out any of Congress's enumerated powers, and therefore it is not authorized under the Necessary and Proper Clause.

a. i. The government characterizes § 4248 as an exercise of Congress's powers to enact criminal laws and operate a prison system. Those powers are not enumerated anywhere in the Constitution. Rather, they are justified as necessary and proper means of carrying out specific enumerated powers. Once the power to enforce a federal criminal law has been exhausted, further exercises of federal power are not "necessary and proper" to effectuating the enumerated power underlying that federal law. That power has been exhausted for Respondents Comstock, Revland, Matherly, and Vigil; they have completed their prison terms for their prior violations of federal law.

ii. In *Greenwood v. United States*, 350 U.S. 366 (1956), the Court upheld the civil commitment of an individual who had been charged with a federal crime but found incompetent to stand trial, concluding that the power to prosecute a federal offense had not been exhausted. Neither *Greenwood* nor the Necessary and Proper Clause authorizes indefinite civil commitment of individuals who have stood trial, been convicted, and served their federal prison sentence.

Section 4248 proceedings are separate from the original criminal proceedings. They require a new factfinder to make new determinations about an individual's propensity for sexual violence, which may have nothing to do with the reason the individual is in BOP custody. Consequently, § 4248 proceedings are not justified by the enumerated power that gave rise to the initial lawful custody.

The break in the chain that connects the enumerated power that justified the initial lawful custody with post-sentence civil detention under § 4248 cannot be repaired by a "common law" duty of a custodian to protect others from those in his custody.[4] Common law duties cannot create federal power. The government has not, moreover, substantiated its theory that custodians have a duty to detain people after they have completed serving their term of imprisonment.

iii. Rather than linking post-sentence civil commitment under § 4248 to a power specifically enumerated in the Constitution, the government seeks to defend § 4248 based on its "special relationship" and "connections" with individuals in federal custody. But the Necessary and Proper Clause requires a nexus to a specific *enumerated power*, not to the individual being regulated. Many citizens have significant relationships with the federal government – as employees, recipients of federal benefits, and in other ways. If this Court were to hold that the Necessary and Proper Clause grants Congress general police powers over anyone with a "connection" to the federal government, the distinction between "what is truly national and what is truly local" would be obliterated. *United States v. Lopez*, 514 U.S. 549, 567-68 (1995).

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[4] The question presented in this case refers to "persons who are in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences." Pet. i. Respondents will refer to these individuals as "post-sentence" individuals even though (1) many of them still have to serve the supervised release portion of their sentence and (2) the "in the custody of the Bureau of Prisons" language of § 4248 refers to a broader class of individuals than those at the end of a federal prison sentence. *See infra* n.9.

Similarly, a general federal "interest" in preventing state and federal crime does not justify detention under § 4248. This Court's decision in *United States v. Salerno*, 481 U.S. 739 (1987), holds that, for purposes of the Due Process Clause, a government interest in safety can sometimes outweigh an individual's liberty interest. *Salerno* did not consider a federalism challenge to the Bail Reform Act; however, a lower court did and correctly concluded that Congress may not authorize commitment to protect the general welfare of the community at large, but that the statute at issue in *Salerno* was limited to preventing specific federal crimes.

iv. The government does not attempt to defend § 4248 as a valid exercise of the commerce power, and it is not. Most sexually violent conduct violates state law rather than federal law, which is limited to sex offenses connected to interstate commerce or the territorial jurisdiction of the United States. This Court has "reject[ed] the argument that Congress may regulate noneconomic violent conduct based solely on that conduct's aggregate effect on interstate commerce." *Morrison*, 529 U.S. at 617. It has similarly rejected the argument that Congress can regulate broad swaths of noneconomic violent conduct because a *subset* of that conduct is within Congress's power to regulate. *Morrison* invalidated a federal statute that provided a civil remedy for state and federal crimes of violence against women because the statute "contain[ed] no jurisdictional element establishing that the federal cause of action is in pursuance of Congress's power to regulate interstate commerce," and instead applied to "a wider, and more purely intrastate, body of violent crime." *Id.* at 613. The government nevertheless attempts to neutralize this Court's decisions in *Morrison* and *Lopez* by pointing to the "connection" between the federal government and persons subject to § 4248. For constitutional purposes, however, what matters is the connection between § 4248 and Congress's enumerated powers. Because that connection is not only attenuated but severed, § 4248 is unconstitutional.

b. Section 4248 is also an improper means of effectuating Congress's enumerated powers. Commitment and treatment of the mentally ill traditionally has been left to the States under their police and *parens patriae* powers, and there is "no better example of the police power than the suppression of violent crime." *Morrison*, 529 U.S. at 618. By encroaching on the States' core police and *parens patriae* powers, § 4248 interferes with the sovereignty of the States.

States are powerless to prevent the detention of their citizens under § 4248, even if detention is contrary to the States' policy choices. Section 4248 takes no account of whether a State has decided not to adopt a special regime of preventive detention for sexually dangerous individuals, or to require that detention be justified by proof beyond a reasonable doubt, or to permit a particular individual to be treated and supervised in a less restrictive setting. Section 4248 thus conflicts with the values of federalism, including the liberty-promoting diffusion of sovereign power, encouragement of experimentation by State and local governments, and promotion of political accountability and responsibility.

c. Section 4248 is not supported by historical analogy or current practice. The history of federal civil commitment reflects longstanding federal reluctance to interfere with the States' police and *parens patriae* powers. Congress repeatedly expressed doubts about the authority of the federal government to provide for the commitment of individuals acquitted of federal crimes on the basis of insanity. Congress and the Executive Branch authorized the federal government to play only a limited role, by providing for the care and treatment of the insane of the army and navy and the District of Columbia. For generations it was settled that a federal prisoner could not be detained following the completion of his term of imprisonment. Section 4248 is a marked departure from this historical practice.

The government portrays § 4248 as a "modest expansion of a settled framework for federal civil commitment," but the expansion is not modest and the framework is not settled. Section 4246 of title 18, the general civil commitment statute, has been applied primarily to individuals deemed incompetent to stand trial. The application of § 4246 to individuals whose term of imprisonment is about to expire – a rare occurrence under that statute but the norm under § 4248 – has never been considered by this Court. Moreover, in contrast to § 4246, § 4248 is not limited to individuals who have been hospitalized and certified as mentally ill, and it does not require the federal government to seek appropriate state care before pursuing federal commitment.

2. Respondent Shane Catron, unlike the other Respondents, was found incompetent to stand trial. In the court of appeals, the government did not ask that Catron be treated differently from the other Respondents, and the court of appeals declined to consider "finely drawn" relief that the government had not requested. Because the government waived this argument in the court of appeals, it should not be considered for the first time by this Court.

The government's argument would fail even if it were not waived. A commitment under § 4246 may result in restoration to competency and eventual prosecution, while a § 4248 commitment lasts as long as the individual is deemed to be sexually dangerous. Unlike in *Greenwood*, Catron's detention is for the purpose of preventing possible future crimes rather than preserving the government's power to prosecute him. The federal government cannot detain an individual indefinitely to prevent him from committing state law crimes.

ARGUMENT

I. CIVIL COMMITMENT PURSUANT TO § 4248 OF INDIVIDUALS AT THE END OF A PRISON SENTENCE EXCEEDS CONGRESS'S POWERS.

The Constitution establishes a federal government of limited powers. *New York v. United States*, 505 U.S. 144, 155 (1992). "Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *Morrison*, 529 U.S. at 607. The United States does not dispute these fundamental principles, but it contends that § 4248 is a valid exercise of Congress's power under the Necessary and Proper Clause. This argument fails because § 4248 is neither necessary nor proper to effectuating any of Congress's enumerated powers.

The government cites only the Necessary and Proper Clause in the "Constitutional and Statutory Provisions Involved" section of its brief. *See* U.S. Br. 1-2. That Clause is not a standalone basis for federal legislation. Section 4248 does not aid Congress in executing the enumerated powers underlying the federal criminal laws, laws that have been fully enforced by the time post-sentence detention begins. Nor is federal regulation of the prospective, and primarily intrastate, conduct of individuals who have served their sentences necessary and proper to effectuating any of Congress's enumerated powers. In the absence of a relationship between § 4248 and a valid subject of federal regulation, the government asks this Court to uphold the statute based on the "special relationship" it has with individuals in federal custody. U.S. Br. 24. The government's approach finds no support in the Constitution or this Court's precedents. If adopted by this Court, this approach would grant the federal government "a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.

A. No Enumerated Power Supports The Enactment of § 4248.

The Necessary and Proper Clause confers legislative power only in conjunction with one or more of the federal government's enumerated powers. The Clause permits Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States." U.S. Const. art. I, § 8, cl. 18. By its terms, the Clause reaches only so far as is necessary and proper to achieve ends that are within the federal government's enumerated powers. *See Sabri v. United States*, 541 U.S. 600, 605 (2004). "The [Necessary and Proper Clause] is not itself a grant of power, but a caveat that the Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of § 8 [of Article I of the Constitution]." *Kinsella*, 361 U.S. at 247 (1960); *see also Carter v. Carter Coal Co.*, 298 U.S. 238, 291 (1936) ("[T]he powers which the general government may exercise are only those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers.").

The Framers understood that the Necessary and Proper Clause requires a connection between the means employed by Congress and one or more of the powers enumerated in the Constitution. Alexander Hamilton wrote that "[i]f there is anything exceptionable [about the Necessary and Proper Clause], it must be sought for in the specific powers, upon which this general declaration is predicated." The Federalist No. 33 (Alexander Hamilton). Similarly, James Madison explained that the Necessary and Proper Clause permits Congress to use means "incident to . . . the specified powers," but "condemn[s] the exercise of any power, particularly a great and important power, which is not evidently and necessarily involved in an express power." 2 Annals of Cong. 1947, 1949 (Joseph Gales ed., 1791).

Madison, discussing the Necessary and Proper Clause during the debate on a bill to establish a Bank of the United States in the First Congress, decried the practice of linking remote implications together to form a "chain . . . that will reach every object of legislation, every object within the whole compass of political economy." *Id.* at 1949. Madison later wrote that "everything is related immediately or remotely to every other thing . . . consequently a Power over any one thing, if not limited by some obvious and precise affinity, may amount to a Power over every other." Letter from James Madison to Judge Spencer Roane (Sept. 2, 1819), *reprinted in* 3 The Founders' Constitution 259 (Philip B. Kurland & Ralph Lerner eds., 1987). This Court reiterated Madison's sentiment in *Lopez,* holding that congressional attempts to pile "inference upon inference" so as to "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States" is an unauthorized assertion of federal power. 514 U.S. at 567.

Throughout its history, this Court has required a connection between the asserted means and the enumerated constitutional power that is being effectuated. In evaluating the constitutionality, under the Necessary and Proper Clause, of the law creating the Bank of the United States in *McCulloch v. Maryland,* Chief Justice Marshall's opinion observes that the creation of a corporation "is never the end for which other powers are exercised, but a means by which other objects are accomplished." 17 U.S. (4 Wheat) 316, 411 (1819). The Court upheld the creation of the bank as an "execution of those great powers on which the welfare of a nation essentially depends," including the enumerated powers to "lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies." *McCulloch*, 17 U.S. (4 Wheat) at 408, 415; *see also Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring in the judgment) ("As Chief Justice Marshall wrote in *McCulloch v. Maryland*, even when the end is constitutional and legitimate, the means must be 'appropriate' and 'plainly adapted' to that end.").

Congress has not acted in furtherance of any of its enumerated powers in creating a scheme for preventively detaining individuals deemed "sexually dangerous." What the government cannot do to the people at large, it cannot do to a subset of the people based solely on its past or present contacts with them. Notwithstanding the "connections," "interests," and "special relationships" the government repeatedly invokes, it cannot escape the fundamental defect in § 4248: it is not necessary and proper to the execution of any enumerated power.

1. Section 4248 Is Unrelated To The Government's "Necessary And Proper" Authority To Prosecute And Punish Federal Crimes.

The government asserts that federal civil commitment of sexually dangerous individuals is related to "Congress's Article I powers to enact criminal laws, provide for the operation of a penal system, and assume for the United States custodial responsibilities for its prisoners." U.S. Br. 23. The powers to enact criminal laws, provide for the operation of a penal system, and assume custodial responsibilities are not *enumerated* in Article I. Instead, each is a necessary and proper means of effectuating the powers that *are* enumerated in the Constitution. *See McCulloch*, 17 U.S. (4 Wheat) at 416-18. Post-sentence detention under § 4248, in contrast, is separate and distinct from the enforcement of the federal laws to which these enumerated powers gave rise.

a. So long as the federal government is enforcing laws that are validly enacted pursuant to an enumerated power, Congress is free to make laws necessary to that enforcement. Once the power to enforce that valid federal law has been exhausted, however, there is no longer an enumerated power to effectuate, and the Necessary and Proper Clause cannot justify further exercises of federal power.

This Court's decision in *Greenwood v. United States* illustrates this important principle. 350 U.S. 366 (1956). In *Greenwood*, the government asked this Court to recognize a federal civil commitment power based on "[t]he duty of the federal government to provide care and custody for incompetents lawfully under its control." Brief for the United States at 37-40, *Greenwood v. United States*, 350 U.S. 366 (1956). This Court declined to do so.

As the Court explained in *Greenwood*, "[t]he power that put [Greenwood] into [federal] custody – the power to prosecute for federal offenses – is not exhausted," and for that reason, his commitment was "auxiliary to incontestable national power." 350 U.S. at 375; *see also id.* at 375 ("We cannot say that federal authority to prosecute has now been irretrievably frustrated."). *Greenwood* thus stands for the significant, but narrow, proposition that civil commitment can be a necessary and proper means to effectuate an unexhausted power to prosecute an individual for violating a federal criminal statute. *Greenwood*'s holding does not "appl[y] equally to a convicted prisoner who is otherwise due for release," U.S. Br. 36, because the government's power to enforce the underlying criminal law has been "exhausted," and therefore continued detention would not be "auxiliary" to any enumerated power. *Greenwood*, 350 U.S. at 375.[5]

Thus, as the Fourth Circuit stated, "*Greenwood* certainly did not approve the federal civil commitment of persons . . . who have stood trial, been convicted, and fully served all federal prison sentences." Pet. App. 19a; *see also United States v. Cohen*, 733 F.2d 128, 137 (D.C. Cir. 1984) (opinion of Scalia, J., for the en banc court) ("That issue was raised, but not resolved by the Supreme Court's decision [in *Greenwood*], which involved federal treatment of a defendant found not competent to stand trial on federal charges. The narrow basis on which the Court found such treatment permissible . . . was that until the federal charges had been disposed of, the individual was properly in the custody of the United States."). The government offers nothing to justify its reading of *Greenwood* as permitting a broad freestanding federal commitment power.

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[5] The government's expansive reading of *Greenwood* disregards the Court's express admonition that it "decide[d] no more than the situation before us presents and equally d[id] not imply an opinion on situations not now before us." 350 U.S. at 376; *see also Jackson v. Indiana*, 406 U.S. 715, 726 (1972) ("It is clear that the Government's substantive power to commit on the particular findings made in [the *Greenwood*] case was the sole question there decided."). The government's reading also disregards the decisions of the only federal court that regularly applied *Greenwood* in the wake of this Court's decision. That court consistently ordered the release of defendants who were judged to have no chance of becoming competent, on the ground that "the 'authority to prosecute [had become] irretrievably frustrated.'" *Pavlick v. Harris*, 222 F. Supp. 79, 81 (W.D. Mo. 1963) (quoting *Greenwood*, 350 U.S. at 375); *see also Kirkwood v. Harris*, 229 F. Supp. 904 (W.D. Mo. 1964); *Tyler v. Harris*, 226 F. Supp. 852 (W.D. Mo. 1964); *Tienter v. Harris*, 222 F. Supp. 920 (W.D. Mo. 1963); *Wieter v. Settle*, 193 F. Supp. 318 (W.D. Mo. 1961); *Sturdevant v. Settle*, 192 F. Supp. 534 (W.D. Mo. 1961); *Frye v. Settle*, 168 F. Supp. 7 (W.D. Mo. 1958).

Similarly, the government's suggestion – that the power to impose a term of supervised release as part of a criminal sentence is analogous to § 4248 – lacks support. The power to impose and enforce supervised release is even more directly related to an enumerated power than the commitment at issue in *Greenwood*. As the government acknowledges, "the terms of supervised release are authorized as part of the original criminal sentence and do not depend on any additional civil-commitment authority." U.S. Br. 38. The government's "ability to take special measures to protect the public" through post-imprisonment supervision does not, as the government's brief implies, flow from its "distinct relationship" with prisoners, *see* U.S. Br. 38, but rather from its power to sentence criminals for violations of federal law. Section 4248, in contrast, embodies a freestanding civil commitment power that is both broader in scope than and different in kind from a valid criminal sentence.[6]

b. Unlike a commitment linked to an unexhausted power to prosecute, commitment under § 4248 is temporally and causally distinct from the exercise of whatever enumerated power initially placed an individual in BOP custody. Congress, for example, has an enumerated "power 'to establish post-offices and post-roads.'" *McCulloch*, 17 U.S. (4 Wheat) at 417. The Necessary and Proper Clause authorizes Congress to "carr[y] into execution" that power by "punish[ing] those who steal letters from the post office, or rob the mail." *Id.* Such punishment has a direct nexus to Congress's exercise of a specific enumerated power by deterring individuals from engaging in specific conduct that frustrates the exercise of that power. And, necessary and proper to effectuating this underlying power, Congress can take measures to preserve the government's ability to prosecute federal crimes, *see Greenwood*, 350 U.S. at 375-76; to impose sentences of imprisonment and supervised release on individuals who commit those federal crimes; to establish a Bureau of Prisons to detain such individuals; and to regulate the way in which these individuals serve their criminal sentences, *see, e.g.*, 18 U.S.C. § 4001(b) (vesting in the Attorney General the control and management of federal penal and correctional institutions).

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[6] *United States v. DeBellis*, 649 F.2d 1 (1st Cir. 1981), and *United States v. Sahhar*, 56 F.3d 1026 (9th Cir. 1995), do not support the government's expansive view of *Greenwood*. Both involved individuals found *incompetent to stand trial*, and, like the defendant in *Greenwood*, within the government's unexhausted power to prosecute. *DeBellis*, 649 F.2d at 2; *Sahhar*, 56 F.3d at 1029-30 ("[The statute] thus is narrowly tailored to apply only to a particular concern of the federal government: dangerous persons charged with federal crimes but found incompetent to stand trial."). Mr. Sahhar was not an "insanity acquitee[]," U.S. Br. 37 because he was never tried and acquitted. Rather, the district court dismissed his indictment. *Sahhar*, 56 F.3d at 1028. The government dismisses indictments against individuals every day with an eye toward superseding them; no one would consider those individuals "acquitted" or the power to prosecute them exhausted.

The federal government does not, however, adopt a penal code, incarcerate individuals, establish a prison system, or regulate prison life because it has acquired a general police power based on its "special relationship" with persons in federal custody. Instead, Congress can enact such laws only because, and only to the extent that, it is effectuating one or more of its enumerated powers. A clear and unbroken connection exists between these aspects of the criminal justice system and the enumerated power that allowed Congress to enact the underlying federal criminal statute and to place an individual in BOP custody for violating it.

Civil commitment under § 4248, in stark contrast, is detached from the enumerated power that placed an individual in BOP custody in the first place. *Cf. Raich*, 545 U.S. at 38 (Scalia, J., concurring in the judgment) ("[T]he power [under the Necessary and Proper Clause] to enact laws enabling effective regulation of interstate commerce . . . extends only to those measures necessary to make the interstate regulation effective."). Sect[illegible] 4248 commitment proceedings are separate and distinct civil proceedings. They do not take place before the district court that tried and sentenced the defendant for violating federal law. Instead, they require a new factfinder to make new determinations about an individual's propensity for sexual violence, which may have nothing to do with the reason the individual is in BOP custody. *See, e.g.*, *United States v. Wilkinson*, 626 F. Supp. 2d 184, 186 (D. Mass. 2009) (individual serving sentence for a firearms violation). Moreover, post-sentence § 4248 proceedings take place after the government's power to punish the underlying offense is exhausted. When the government commences a distinct civil proceeding for the post-sentence detention of an individual based on the concern that he will commit state law crimes in the future, its actions bear no cognizable relation to the enumerated power that gave rise to the initial lawful custody.[7]

c. Post-sentence detention under § 4248 represents a fundamental break in the chain that connects to the enumerated power giving rise to the original criminal prosecution. The government cannot supply the missing link in this chain by pointing to the Second Restatement of Torts and asserting that its custodianship creates a "common law" duty not to release someone who may harm others. U.S. Br. 32 (quoting Restatement (Second) of Torts § 319 (1965)).

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[7] It is this separation between criminal detention and civil commitment that has allowed governments to relax certain criminal protections in committing mentally ill individuals. When this Court evaluated a state civil commitment statute in *Kansas v. Hendricks*, it determined that the statute survived constitutional scrutiny precisely because it was civil, not criminal, in nature. 521 U.S. 346, 368-69 (1997); *see also id.* at 373 (Kennedy, J., concurring) ("If . . . civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.").

The government's asserted tort law "duty to control" is entirely circular. The duty applies only to persons that a custodian has a legal right to hold. *See Rousey v. United States*, 115 F.3d 394, 398 (6th Cir. 1997) ("[T]he defendant can incur a legal duty to control a person only when the defendant possesses (or at least can obtain) the *legal* power to control that individual." (emphasis added)); *Currie v. United States*, 836 F.2d 209, 212 (4th Cir. 1987) ("When a mentally ill person has been *lawfully* committed to an institution and the institution *has the right* and the power to continue to restrain him, a negligent failure to exercise the power . . . renders those responsible for the failure to exercise control properly subject to liability."); *see also Seibel v. City and County of Honolulu*, 602 P.2d 532, 534-38 (Haw. 1979) (no duty to control dangerous criminal defendant on conditional release pursuant to court order); *Lamb v. Hopkins*, 492 A.2d 1297 (Md. 1985) (no duty to control probationer who injured victim while driving under the influence); *Paschall v. N.C. Dep't of Corr.*, 364 S.E.2d 144, 146-47 (N.C. Ct. App. 1988) (no duty to continue detaining dangerous mentally ill patient after basis for his court-ordered commitment had lapsed).[8] And even if such a duty exists at common law, it does not supply the missing link between § 4248 detention and the enforcement of an underlying federal law that has already been prosecuted. Common law duties do not override constitutional limitations.

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[8] *See also* 18 U.S.C. § 3624(a) ("A prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment . . . ."). The government fails (...continued)

As the court of appeals noted in this case, "[t]he fact of previous lawful federal custody simply does not, in itself, provide Congress with any authority to regulate future conduct that occurs outside of the prison walls." Pet. App. 14a. Whatever legitimate power the federal government has over an individual by virtue of his status as a federal prisoner ends when he is no longer legitimately in federal custody, and with it ends the government's ability to effectuate the enumerated power supporting the original conviction.

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to identify cases holding that the duty to control a prisoner continues after he is no longer lawfully in custody. *See Hinckley v. United States*, 163 F.3d 647, 648-49 (D.C. Cir. 1999) (patient lawfully committed under D.C. Code § 24-301); *Smith v. Hope Vill., Inc.*, 481 F. Supp. 2d 172, 177 (D.D.C. 2007) (inmate lawfully in custody of "community-based correctional facility").

Section 4248 itself belies the government's attempt to rely on an asserted tort duty to justify the statute. Section 4248(g) provides that if charges are dismissed against a person who has been committed as a "sexually dangerous person" under § 4248 for reasons not related to his or her mental condition (i.e., evidence is suppressed because of a Fourth Amendment violation), the government *must release* that individual from its custody. *See* 18 U.S.C. § 4248(g). That congressional directive to release a "sexually dangerous person" undermines the government's argument that § 4248 embodies a duty not to release dangerous persons from federal custody.

2. Congress Cannot Derive Broad Regulatory Authority From "Connections," "Interests," or "Special Relationships" That Are Unmoored From Enumerated Powers.

Because no causal chain links an enumerated power to post-sentence civil commitment under § 4248, the government attempts to rely on the "connections," "interests," and "special relationships" that it has with individuals "in the custody of the Bureau of Prisons." *See, e.g.*, U.S. Br. 19, 23, 44, 48. This line of argument fails because the Necessary and Proper Clause does not demand a nexus to federal "interests," "connections" or "special relationships"; it demands a nexus to an enumerated power. Section 4248's limitation to individuals "in the custody of the Bureau of Prisons" does not provide the required nexus to an enumerated power.[9] The Necessary and Proper Clause does not grant Congress a police power over individuals based solely on their connection with the federal government.

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[9] The government has argued repeatedly that § 4248 applies to all persons "in the custody of the Bureau of Prisons" and is not restricted to individuals convicted of any federal crimes. As the Fourth Circuit noted, the government's position extends to "material witnesses, civil contempt detainees, and individuals in immigration detention," and is not even limited to cases where "custody is lawful." Pet. App. 14a n.7 (noting the government's position in *United States v. Shields*, 522 F. Supp. 2d 317 (D. Mass. 2007), and *United States v. Hernandez-Arenado*, 624 F. Supp. 2d 985 (S.D. Ill. 2008), *aff'd*, 571 F.3d 662 (7th Cir. 2009)).

a. The government argues that even when Congress has no power to regulate a particular activity, it may nonetheless regulate that activity when it is done by a person with "connections" to the federal government. The sweeping implications of this argument are not difficult to see. Indeed, this Court has already rejected the government's argument, noting that its results would be extreme. *See Reid v. Covert*, 354 U.S. 1, 20 (1957) (labeling as "extreme" the theory that, based on the Necessary and Proper Clause, Congress could "subject[] persons who made contracts with the military to court-martial jurisdiction with respect to frauds related to such contracts").

The "connection" the federal government forms with the people in its custody is no more meaningful, in a constitutional sense, than the "connection" it forms with people who benefit from Social Security, Medicare, and Medicaid. But it would be an unduly expansive view of the Necessary and Proper Clause if the federal government were permitted to "criminaliz[e] fraud of any kind perpetrated on any individual who happens to receive federal welfare benefits." *Sabri*, 541 U.S. at 614 (Thomas, J., concurring in the judgment). The government's position in this case would permit Congress to go still farther, criminalizing simple assaults by or against current or former welfare or Social Security beneficiaries, or even detaining those individuals indefinitely for general safety purposes.

To take another example, the federal government employs a large number of individuals. The employer/employee relationship exhibits some of the characteristics of the jailor/prisoner relationship that the government claims provides it with the power to enact § 4248. *Compare, e.g.*, Restatement (Third) of Agency § 2.04 (*respondeat superior*), *with* Restatement (Second) of Torts § 319 (duty of a custodian). Concerns similar to those raised above are equally applicable to this relationship.

Given the breadth of relationships the modern federal government forms, if the Necessary and Proper Clause creates a freestanding authority to regulate anyone with a "connection" to the federal government, "there never will be a distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 567-68.

b. The government's related argument that it may rely on a generic federal "interest" in justifying § 4248 is similarly unavailing. It asserts that the federal government's interest in crime prevention "has never turned on whether" state or federal crimes are concerned, and in support cites *United States v. Salerno*, 481 U.S. 739 (1987). U.S. Br. 47. The government's reliance on *Salerno* is misguided and epitomizes the basic error that runs throughout its defense of § 4248 – dependence on sources that assume rather than prove the existence of federal power. In *Salerno*, this Court did not consider a federalism challenge to the Bail Reform Act. Instead, the *Salerno* Court held that, for due process purposes, a government interest in safety can in some circumstances outweigh an individual's liberty interest. The government makes a fundamental error by confusing the "governmental interest" in a due process challenge with the *enumerated power* it must point to in demonstrating that its actions are authorized by the Constitution.[10]

Although the Court did not address a federalism challenge to the Bail Reform Act in *Salerno*, the Third Circuit Court of Appeals did confront such a challenge, and it addressed the distinction the government now seeks to elide. On the due process question, the Third Circuit reached the same conclusion that this Court ultimately reached in *Salerno*. *See United States v. Perry*, 788 F.2d 100, 113 (3d Cir. 1986). But in deciding whether Congress had the *power* to enact the Bail Reform Act, the Third Circuit held that "Congress may not . . . authorize commitment simply to protect the general welfare of the community at large," and that commitment must be "necessary and proper to the exercise of some specific federal authority." 788 F.2d at 110. The court concluded that Congress had authority to enact the pre-trial detention statute at issue only because it was "aimed at preventing the specific harm to the community proscribed by the four designated [federal] statutes." *Id.* at 111.[11] In marked contrast to the government's approach here, the Third Circuit appropriately distinguished a due process challenge from a federalism challenge and recognized, as to the latter, that the government has no "interest" unmoored from its enumerated powers that allows it to exercise a police power – even over individuals already in the criminal justice system. Where, as here, a federal commitment statute does not further the enforcement of a federal law that has already been fully enforced, and does not regulate future conduct within Congress's power to regulate, the assertion of generic federal "connections" and "interests" cannot save it.

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[10] The Government commits this same error in relying on *Jones v. United States*, another due process case. *See* 463 U.S. 354 (1983). Jones was prosecuted in the District of Columbia, found not guilty of by reason of insanity, and civilly committed by the government. *Id.* at 359-60. He raised a due process challenge to the length of his commitment and the processes used to keep him committed. *Id.* *Jones* assumes that the power over the person exists and addresses only the procedural requirements for commitment; it did not consider the basis of the government's commitment power.

[11] The statute at issue in *Greenwood* also contained a specific reference to federal interests. *See Greenwood*, 350 U.S. at 368 (noting that statute authorized commitment at expiration of (...continued)

3. The Enumerated Powers That Underlie Federal Sex Crimes Do Not Justify § 4248.

Despite what has been described as a "knee-jerk tendency of Congress to seek to remedy any serious abuse by invoking the commerce power as a basis for the expansion of the federal criminal law into areas of scant federal concern," Henry J. Friendly, *Federalism: A Foreward*, 86 Yale L.J. 1019, 1027 (1977), the government has not attempted to justify § 4248 as a valid exercise of Congress's power to regulate interstate commerce, or any other enumerated power. This case, therefore, is not primarily about the scope of the Commerce Clause.

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criminal sentence if prisoner is insane and there is "a probable danger to the officers, property, or other interests of the United States"). Section 4248, unlike the statutes at issue in *Greenwood* and *Perry*, contains no such specific connection to a federal interest.

Rather, it is about how far the Necessary and Proper Clause extends when the law at issue lacks a sufficient nexus to any enumerated power.

Moreover, § 4248 is not a valid exercise of the commerce power. Most crimes involving sexually violent conduct violate state law rather than federal law. Federal statutes regulating sex offenses either specifically require a connection to interstate commerce, *see, e.g.*, 18 U.S.C. § 2252(a)(2), or are limited to the territorial jurisdiction of the United States, *see, e.g., id.* § 2243(a). *See* Pet. App. 15a-16a n.8 (noting that in 2004, States had in their custody approximately 153,800 prisoners convicted of rape or other sexual assault, which is approximately equal to the total number of persons in federal prison for all crimes). Nor could it be otherwise, as this Court has "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Morrison*, 529 U.S. at 617.[12] Section 4248 has neither limitation, and, by targeting "sexual dangerousness" generally, seeks to prevent conduct that federal law does not and cannot constitutionally reach.

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[12] In *Gonzales v. Raich*, this Court upheld the federal regulation of homegrown marijuana as within Congress's commerce power, "because production of the commodity meant for home consumption . . . has a substantial effect on supply and demand in the national market for that commodity." 545 U.S. at 19. Unlike the regulation of homegrown marijuana, a fungible commodity indistinguishable from the marijuana marketed in interstate commerce, regulation of the prospective intrastate behavior of a former prisoner is not "a necessary part of a larger regulation." *Id.* at 40 (Scalia, J., concurring in the judgment).

The government does not seriously dispute that § 4248 seeks to prevent conduct of purely local concern. Instead, it tries to shift the Court's focus by noting that § 4248 regulates *some* conduct appropriately within the reach of federal power. *See* U.S. Br. 48 (observing that "sexually dangerous" offenses involving interstate travel or federal territorial jurisdiction are within the federal power to regulate).

Precisely the same was said about the Violence Against Women Act found unconstitutional in *Morrison*. That statute created a civil remedy for "crime[s] of violence motivated by gender," and defined "crime[s] of violence" as those "that would come within the meaning of State *or Federal* offenses described in section 16 of Title 18." *Morrison*, 529 U.S. at 605-06 (quoting 42 U.S.C. § 13981(d)(1)-(2)) (emphasis added). In striking down the statute, the Court noted that it "contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress's power to regulate interstate commerce," and that Congress instead "elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime." *Id.* at 613; *see also Lopez*, 514 U.S. at 561 ("[Section] 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.").

Section 4248's possible relation to federal crimes is even more infirm than the relationship at issue in *Morrison*. *Morrison* applied to actual violence against women rather than predictions about future sexual violence. Moreover, in *Morrison*, Congress made "numerous findings" about the impact of gender-motivated violence on interstate commerce. 529 U.S. at 614. In enacting § 4248, Congress made no legislative findings about the effect that federal civil commitment of violent sex offenders would have on interstate commerce or on any other area within the sphere of Congress's enumerated powers. *See United States v. Wilkinson,* 626 F. Supp. 2d 184, 190 (D. Mass. 2009) (noting the government's concession that there were "no Congressional findings regarding the effects of prisoners who are potentially sexually violent or dangerous on interstate commerce"); *cf. Lopez,* 514 U.S. at 562 (noting that "neither [§ 922(q)] nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone" (citation omitted)). It is merely post-hoc speculation, not the predictive judgment of Congress, that the conduct § 4248 seeks to prevent will be to any substantial degree conduct that Congress has the power to regulate.

The government attempts to distinguish *Lopez* and *Morrison* by arguing that the problem with the statutes in those cases was the lack of assurance that "the conduct to be regulated in an individual case" had "a direct, as opposed to attenuated, connection with a proper subject of federal regulation." U.S. Br. 43. The government then makes an unwarranted leap by arguing that § 4248 does not present this problem because it applies only to individuals who are in BOP custody, and so there is "nothing attenuated about the connection between the federal government and *the persons to whom Section 4248* *may be applied.*" U.S. Br. 44 (emphasis added). There may not be anything attenuated about the connection between the federal government and its prisoners, but there is something quite attenuated – disconnected, in fact – about the link between the conduct regulated by § 4248 and an enumerated federal power.

A jurisdictional nexus, by definition, must connect Congress's asserted authority *to an enumerated power*. Although Congress limited § 4248's reach to those "in the custody of the Bureau of Prisons," that limitation does not remedy the lack of a connection to an enumerated power. As discussed above, § 4248 does not relate to the enumerated power that placed the individual in BOP custody, nor does it relate to anything that the individual did while in BOP custody. The "in the custody of the Bureau of Prisons" language in § 4248 does not operate as a jurisdictional nexus. It is a limitation, but not a constitutionally meaningful one.

The government attempts to convert Congress's limited power to criminalize narrow forms of sexual violence into a general power to regulate all sexual violence, including acts which violate no federal criminal statute and which would not be constitutionally permissible targets of a federal prosecution. This Court has rejected previous congressional attempts to "pile inference upon inference" so as to "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567; *cf. Raich*, 545 U.S. at 65 (Thomas, J., dissenting) (just as allowing Congress to regulate intrastate, noncommercial activity under the

Commerce Clause would confer on Congress a general police power over the Nation, "[t]his is no less the case if Congress ties its power to the Necessary and Proper Clause"). This Court should reject Congress's attempt to do so here.

B. Section 4248 Encroaches On The Authority Of The States And Is Therefore Not A "Proper" Executory Law.

Not only is § 4248 not "necessary" to the execution of any enumerated power, but it is also not "proper." *See Printz v. United States*, 521 U.S. 898, 923-24 (1997). "[A] 'proper' executory law must respect the system of enumerated federal powers: executory laws may not regulate or prohibit activities that fall outside of the subject areas specifically enumerated in the Constitution." Gary Lawson & Patricia G. Granger, *The 'Proper' Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 285 (1993); *accord* Laurence Tribe, 1 American Constitutional Law § 5-3 (3d ed. 2000) ("The exercise by Congress of power ancillary to an enumerated source of national authority is constitutionally valid, so long as the ancillary power neither conflicts with external limitations – such as those of the Bill of Rights and of federalism – *nor renders Congress's powers limitless*." (emphasis added)).

Hamilton spoke of the Necessary and Proper Clause's propriety test as follows: "The propriety of a law in a constitutional light, must always be determined by the nature of the powers upon which it was founded. Suppose . . . [Congress] should attempt to vary the law of descent in any State; would it not be evident that . . . it had exceeded its jurisdiction and infringed upon that of the State? Suppose again that upon pretence of an interference with its revenues, it should undertake to abrogate a land tax imposed by the authority of a State, would it not be equally evident that this was an invasion of that concurrent jurisdiction . . . which its constitution plainly supposes to exist in the State governments?" The Federalist No. 33 (Alexander Hamilton).

In both cases, Hamilton concluded that the Constitution invalidated the hypothetical law in question not because its means were too remotely connected to its ends, but rather because its means encroached on the jurisdiction of state governments. Later, Hamilton wrote that "[t]here is also this further criterion which may materially affect the decision: Does the proposed measure abridge a pre-existing right of any State, or of any individual? If it does not, there is a strong presumption in favour of its constitutionality . . . ." Alexander Hamilton, Opinion on the Constitutionality of a National Bank (Feb. 23, 1971), *reprinted in* 3 The Founders Constitution 250 (Philip B. Kurland & Ralph Lerner eds., 1987). Thus, Hamilton concluded that Congress may not create a corporation "for superintending the police of the city of Philadelphia because they are not authorized to regulate the police of that city," but it may create a corporation "in relation to the collection of taxes, or to the trade with foreign countries . . . because it is the province of the federal government to regulate those objects . . . ." *Id.*

In seeking to commit "sexually dangerous" persons in BOP custody, Congress encroaches on the States' police and *parens patriae* powers. In assuming these core state functions, § 4248 disrespects the sovereignty of the States and undermines bedrock constitutional values. For these reasons, § 4248 is not "proper" within the meaning of the Necessary and Proper Clause.

1. Police And *Parens Patriae* Powers Are Not Proper "Ends" For Federal Government Regulation.

Like the purely state matters of which Hamilton spoke, police and *parens patriae* powers are exercised by the States rather than the federal government. "The Constitution . . . withhold[s] from Congress a plenary police power." *Lopez*, 514 U.S. at 566; *see also id.* at 580 (Kennedy, J., concurring) ("[A]t the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern."); *Morrison*, 529 U.S. at 618 n.8 ("With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the federal government an unlimited license to regulate. . . . Moreover, the principle that 'the Constitution created a Federal Government of limited powers,' while reserving a generalized police power to the States, is deeply ingrained in our constitutional history."). There is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime." *Morrison*, 529 U.S. at 618.

Section 4248 not only attempts to suppress violent crime, but does so by interfering with another core area of traditional state concern: civil commitment of the dangerous and mentally ill. The *parens patriae* power, which supports the sovereign's role as "'the general guardian of all infants, idiots, and lunatics,'" is a "function of the King [that] passed to the States." *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257 (1972) (quoting 3 William Blackstone, *Commentaries* *47). "The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." *Addington v. Texas*, 441 U.S. 418, 426 (1979); *see also Foucha* v. *Louisiana*, 504 U.S. 71, 96 (1992) (Kennedy, J., dissenting) ("In the civil context, the State acts in large part on the basis of its *parens patriae* power to protect and provide for an ill individual.").

As a committee of the House of Representatives noted in refusing to expand the federal role in civil commitment, "[c]ommitment and treatment of the mentally ill has traditionally been left to the states pursuant to their *parens patriae* or general police power. The Federal government has no such authority." H.R. Rep. No. 96-1396, at 561

(1980), *quoted in Cohen*, 733 F.2d at 137.[13] The historical record bears out this conclusion, *see* Samuel Jan Brakel et al., The Mentally Disabled and the Law 22 (3d ed. 1985); Albert Deutsch, The Mentally Ill in America 137-41 (2d ed. rev. 1949), and courts have long recognized it. *See generally* Note, *Federal Hospitalization of Insane Defendants Under Section 4246 of the Criminal Code*, 64 Yale L.J. 1070, 1070 n.2 (1955) (collecting cases).[14]

Because civil commitment falls squarely within the realm of traditional state police and *parens patriae* powers – not proper "ends" for federal regulation – § 4248 violates the "propriety" limitation of the Necessary and Proper Clause. "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). Congress's assertion of federal power through § 4248 takes it far from the powers enumerated in the

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[13] *See also* Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. Pa. L. Rev. 832, 836 (1960) ("A state can subject any mentally ill person to an involuntary civil commitment, a power which stems from Chancery's exercise of the doctrine of *parens patriae*. . . . The Constitution, however, nowhere gives the federal government general commitment power over the insane, and prior to the 1949 statute the absence of any federal legislation or judicial assertion of such power bears out the assumption that *parens patriae* powers are reserved to the states.").

[14] *See also Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 590-91 (10th Cir. 1999); *McCabe v. Life-Line Ambulance Serv., Inc.*, 77 F.3d 540, 547 (1st Cir. 1996); *White v. Napoleon*, 897 F.2d 103, 112 (3d Cir. 1990).

Constitution, and infringes on the core domain of the States.

2. Section 4248 Undermines The Values Protected By The Constitution's Commitment To Federalism.

The government insists that § 4248 respects the "etiquette of federalism," because it allows States to "assume responsibility" for the indefinite detention of individuals the Attorney General considers sexually dangerous. U.S. Br. 44-45. *But see United States v. Darby*, 312 U.S. 100, 114 (1941) ("[Congressional] power can neither be enlarged nor diminished by the exercise or non-exercise of state power."). This assumption of responsibility does not, however, provide the States with – or divest the federal government of – any real power over their citizens. *Cf. United States v. Husar*, 859 F.2d 1494, 1497 (D.C. Cir. 1988) (per curiam) ("Congress, we think it plain, did not intend that the relocation of an [insanity] acquittee would give him a state pass to freedom on terms any less stringent than those imposed by federal law."); *see also United States v. Denny-Shaffer*, 2 F.3d 999, 1021 n.30 (10th Cir. 1993) (following *Husar*). For the States, therefore, § 4248 presents the following choice: indefinitely detain your citizens that the federal government has deemed dangerous, or the federal government will indefinitely detain them itself. That is no real choice at all.[15]

Posing such a false choice is hardly respectful of the "etiquette of federalism." *Lopez,* 514 U.S. at 583 (Kennedy, J., concurring). Although the federal government does "not . . . direct[] the State to enact a certain policy" by "formal command," it respects state law enforcement prerogatives only when the State is in line with federal policy, and thus "the intrusion is nonetheless significant." *Id.* While § 4248 permits a State to detain its citizens itself, the federal government usurps true policymaking discretion. *See Printz,* 521 U.S. at 928 ("leav[ing] no 'policymaking' discretion with the States . . . worsens the intrusion upon state sovereignty"). Some States have determined that the balance between liberty and security is best struck by applying a "beyond a reasonable doubt" standard, and thus do not allow detention based on a showing only of "clear and convincing evidence" of sexual dangerousness.[16] Other States have not found it necessary or appropriate to adopt any special regime for the detention of sexually dangerous individuals, relying instead on longstanding provisions for the supervision of the mentally ill.[17] Even if a State has adopted a regime similar to § 4248, it may be convinced that one of its citizens can be prevented from violating state laws through outpatient therapy and careful supervision. States are nevertheless powerless to prevent the federal government from detaining their citizens under § 4248, even if the detention is contrary to the States' own policy choices. This is "declination of responsibility," U.S. Br. 46, only on the assumption that the States are not entitled to make their own policy choices in areas of local concern.

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[15] It is instead a "Morton's Fork," like the illusory choice that King Henry VII's tax collector Morton offered English subjects: live in luxury and be taxed heavily because you must have money to spare, or live in poverty and be taxed heavily because you must have money saved. *See* 1 Stephen Dowell, A History of Taxation and Taxes in England 200 (3d ed. 1965).

[16] At least nine States have made such a choice. *See* Ariz. Rev. Stat. §§ 36-3701 *et seq.*; Cal. Welf. & Inst. Code §§ 6600 *et seq.*; 725 Ill. Comp. Stat. §§ 207/1 *et seq.*; Iowa Code §§ 229.1A *et seq.*; Kan. Stat. Ann. §§ 59-29a01 *et seq.*; Mass. Gen. Laws ch. 123A, §§ 1 *et seq.*; S.C. Code Ann. §§ 44-48-10 *et seq.*; Tex. Health & Safety Code Ann. §§ 841.001 *et seq.*; Wash. Rev. Code §§ 71.09.010 *et seq.*

Section 4248 violates not only the "etiquette" of federalism but the underlying values it serves. Federalism, "the unique contribution of the Framers to political science and political theory," *Lopez*, 514 U.S. at 575 (Kennedy, J., concurring), is concerned with more than respect for the States as coequal sovereigns. It embodies long-recognized constitutional commitments, which are undermined by Congress's attempt to regulate the future intrastate behavior of individuals.

First, "federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S.

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[17] Twenty-nine States have no statute similar to § 4248. *See* Kansas Amicus Br. 8 ("[O]nly 21 states have such programs [as § 4248]").

722, 759 (1991) (Blackmun, J., dissenting)); *see also Morrison*, 529 U.S. at 616 n.7 ("As we have repeatedly noted, the Framers crafted the federal system of government so that the people's rights would be secured by the division of power."); *Printz*, 521 U.S. at 921 ("This separation of the two spheres is one of the Constitution's structural protections of liberty."); *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring) ("Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one."); *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991) ("In the tension between federal and state power lies the promise of liberty."); The Federalist No. 51 (James Madison) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.").

This case implicates the Constitution's intertwined commitments to liberty and federalism. "'In our society liberty is the norm,' and [preventive detention] 'is the carefully limited exception.'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality opinion) (quoting *Salerno*, 481 U.S. at 755). Whether Respondents' indefinite detention violates the Fifth Amendment's Due Process Clause,[18] it indisputably burdens their liberty interests, and does so through an unprecedented extension of federal power. Yet § 4248 imposes this burden for the purpose of preventing state law crimes, even if the State concerned would choose not to detain its citizen. In such a situation, mandating detention, but allowing the State to do the actual detaining itself, is not consonant with the Framers' liberty-promoting vision of federalism.

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[18] Although not at issue before this Court, Respondents argued successfully before the district court that § 4248's "clear and (...continued)

Second, our system of federalism enables individual States to serve as laboratories for new and experimental social policies. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Not only does federalism foster experimentation, but it enhances the ability of individual citizens to engage in the democratic enterprise and craft local solutions to local problems. *See Gregory*, 501 U.S. at 458 (federalism "increases opportunity for citizen involvement in democratic processes"); Stephen Breyer, Active Liberty 57 (2005) ("[F]ederalist principles secure decisions that rest on knowledge of local circumstances, help to develop a sense of shared purposes and commitments among local citizens, and ultimately facilitate novel social and economic experiments." (internal quotation marks omitted)). Of course, as with violence against women and guns in schools, "it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy" to permit sex crimes to occur. *Lopez*, 514 U.S. at 581. But as with most

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convincing" standard violates the Fifth Amendment. The Fourth Circuit did not reach that issue.

complicated matters of local policy, "considerable disagreement exists about how best to accomplish that goal." *Id.*; *see also* Breyer, *supra*, at 58 ("[D]ifferent communities may place different weights upon . . . benefits and costs. These differences suggest that citizens in different local communities may come up with different answers to the same basic questions . . . .").

Section 4248, like the federal law punishing possession of a gun in a school zone in *Lopez*, "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). If Texas, in regulating its own internal affairs, determines that an alternative policy regarding potentially "sexually dangerous persons" serves its interests in rehabilitation and crime-prevention, this Court should regard it not as a "declination of responsibility," U.S. Br. 46, but rather a worthwhile experiment in democratic self-governance.

Third, federalism promotes good governance by ensuring "two distinct and discernable lines of political accountability." *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring). "Federalism serves to assign political responsibility, not to obscure it." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). "Were the Federal Government to take over the regulation of entire areas of traditional state concern . . . the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring). When these lines become blurred, States are "put in the position of taking the blame for [a federal policy's] burdensomeness and for its defects." *Printz*, 521 U.S. at 930; *see also New York*, 505 U.S. at 169 ("Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not [appropriately] pre-empted by federal regulation.").

The acquiescence of some law enforcement officers of some of the States in this expansion of federal power does not ameliorate the undermining of these constitutional protections. As the government concedes, "[t]he boundaries of Congress's Article I powers do not expand or contract on the basis of States' acquiescence or objection." U.S. Br. 45 n.17 (citing *Raich*, 545 U.S. at 29); *see also Morrison*, 529 U.S. at 661 (Breyer, J., dissenting) ("[A]ttorneys general in the overwhelming majority of States (38) supported congressional legislation" on gender-motivated violence.).

The defense of § 4248 offered by Kansas and other states actually underscores the need for judicial vigilance. Kansas warns that absent § 4248, "29 states would be compelled to start [detention] programs, or persons in federal custody designated for release in any of those 29 states would simply have to be let go." Kansas Amicus Br. 8-9. In other words, these States would be required to make a policy decision in the exercise of their police power. The fact that some state law enforcement officials support federal intervention to achieve "objectives that could not be achieved through the ordinary democratic process" in their States, *Horne v. Flores*, 129 S. Ct. 2579, 2593 n.3 (2009), highlights the threat this case presents to the federalist values of political accountability and democratic self-governance.[19]

C. Section 4248 Represents An Unconstitutional Assertion Of Federal Power Without Analogy In History Or Current Practice.

The Fourth Circuit correctly held that § 4248 represents an unconstitutional assertion of federal power because it does not effectuate any of Congress's enumerated powers and is incompatible with the purpose and structure of federalism. The government glosses over these constitutional problems by devoting much of its brief to chronicling the history of detention by the federal government and comparing § 4248 to 18 U.S.C. § 4246. The government's argument misapprehends the historically limited role of the federal government in this area. In doing so, the government side-steps the core issue presented in this case: whether Congress has power under Article I to impose "the indefinite civil commitment of persons *after* the expiration of their prison terms, based solely on possible future actions that the federal government lacks power to regulate directly." Pet. App. 14a.

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[19] Recognizing that § 4248 is supported by no federal power and undermines core federalism values does not prevent the federal government from working cooperatively with the States to help them solve their local problems. As the Fourth Circuit noted, the government "can notify state authorities, who may use their well-settled police and *parens patriae* powers to pursue civil commitment under state law." Pet. App. 20a. The government can also "wield its spending power to encourage state action." *Id.*; *see* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, § 301 (authorizing "grants to jurisdictions for the purpose of establishing, enhancing, or operating effective civil commitment programs for sexually dangerous persons"). And the government may also use supervised release to address its policy concerns. *See Wilkinson*, 626 F. Supp. 2d at 193-94 ("[I]f no state were willing to deal with a prisoner believed by the Bureau of Prisons to be sexually dangerous, the Department of Justice could request a hearing on the first day of the defendant's Supervised Release and ask the court to alter the conditions of Supervised Release to protect against that perceived danger." (citing 18 U.S.C. § 3583(e)(2); Fed. R. Crim. P. 32(c)(1))).

1. The History Of Federal Civil Commitment Demonstrates That The Government Lacks The Power To Commit Individuals At The End Of Their Prison Term.

The government seeks to portray § 4248 as a "modest expansion of a settled framework for federal civil commitment of dangerously mentally ill persons in federal custody." U.S. Br. 39. The history of federal civil commitment reveals just the opposite. The expansive powers asserted by § 4248 depart sharply from the longstanding federal reluctance by all branches of the federal government to interfere with the States' police and *parens patriae* powers in this area. Generations of legislative, executive, and judicial practice have consistently rejected such an exercise of federal power.

The district court noted that "[p]rior to 1984, Congress expressed doubt, on a number of occasions, about its authority to provide for the federal commitment of individuals acquitted on the basis of insanity." Pet. App. 60a; *see also Shannon v. United*

States, 512 U.S. 573, 577 (1994); *United States v. McCracken*, 488 F.2d 406 (5th Cir. 1974).

Other courts have also emphasized this congressional reluctance. In *United States v. Cohen*, 733 F.2d 128 (D.C. Cir. 1984) (en banc), then-Judge Scalia reviewed the legislative history of civil commitment schemes for insane defendants, which reflected concern that federal civil commitment would unconstitutionally intrude on the power of the States, noting that "Congress on a number of occasions considered providing for the commitment, nationwide of federal defendants acquitted on grounds of insanity." *Id.* at 137-38. The opinion refers to a "well-considered analysis by the House Judiciary Committee of the major concern leading to rejection" of such federal commitment:

> The Committee recognizes that the Federal government is one of specifically enumerated powers. State governments, on the other hand, may act in any given area unless specifically prohibited by the Constitution. Commitment and treatment of the mentally ill has traditionally been left to the states pursuant to their *parens patriae* or general police power. The Federal government has no such authority. . . .
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> . . . .
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> In view of these considerations, the Committee believes that a Federal procedure for the commitment of the dangerously mental[ly] disturbed would

> constitute an inappropriate interference with the balance of Federal and State powers. . . . The Committee thus believes that the care of the mentally ill is a task that uniquely belongs within the *parens patriae* powers of the States.

Id. (footnote omitted) (bracketed material in original) (quoting H.R. Rep. No. 96-1396, 559, 561 (1980)); Pet. App. 61a-62a. Thus, Congress has long recognized the constitutional problems inherent in federal civil commitment of the mentally ill and did not contemplate a wholesale federal power over all individuals with whom the federal government "has a special relationship." U.S. Br. 23.

Similarly, the creation of St. Elizabeth's Hospital, relied upon by the government, U.S. Br. 24-29, does not provide support for § 4248. *See* Act of March 3, 1855, ch. 199, § 1, 10 Stat. 682 (establishing a "Government Hospital for the Insane," whose object would be "the most humane care and enlightened curative treatment of the insane of the Army and Navy of the United States, and of the District of Columbia."). It is within Congress's power to regulate the armed forces and the District of Columbia. *See* U.S. Const. art. I, § 8, cl. 14, 17. Creating the hospital filled a gap in an area of undisputed federal authority allowing mentally ill military personnel and District residents to receive treatment that was otherwise lacking.

Contrary to the government's current position, the Attorney General interpreted the statute narrowly, to avoid overstepping this limited role. *See Gov't Hosp. for the Insane*, 7 Op. Att'y Gen. 450, 451 (1855) (reasoning that if non-residents were admitted to the Hospital "all the indigent insane from all parts of the United States, nay, of the world might be brought [to the Hospital]"). Limited interpretations of the scope of the federal government's role in this area continued after St. Elizabeth's founding. *See Gov't Hosp. for the Insane,* 17 Op. Att'y Gen. 211, 212 (1881) ("[T]he States are expected to make [such provision] for the insane persons residing within their borders . . . no reason can be suggested why an insane resident of Texas should be brought and maintained [in the District of Columbia]" by the federal government).

In 1916, Attorney General Gregory opined that a federal prisoner could not be detained for reasons of insanity following the completion of his term of imprisonment. The Attorney General found that the purpose of the relevant commitment statute "was to secure proper treatment for insane persons 'during the term of their imprisonment' – not to prolong that imprisonment." *Commitment to Gov't Hosp. for the Insane*, 30 Op. Att'y Gen. 569, 571 (1916).

Attorney General Gregory pointed out that, although an individual may be entitled to be discharged at the completion of his term of imprisonment, after his release "like any other citizen, he [would be] subject to the insanity laws and processes of the State, Territory, or district wherein he might be found and accused of insanity." *Id.* Attorney General Sargent later confirmed that view, noting "an intention on the part of Congress to provide for the care of the insane convict only during the term of imprisonment." *Care of Insane Convict*

After Expiration of Term of Imprisonment, 35 Op. Att'y Gen. 366, 368 (1927).

In sum, the federal government has long limited its role in the mental health field to individuals over whom it has plenary control and only for so long as it has legitimate control over them.[20] There is no historical precedent for a broad federal civil commitment authority. To the contrary, the historical record shows great reluctance on the part of the federal government to undertake civil commitment due to the serious constitutional questions it raises.

2. The Government Cannot Justify § 4248 By Analogy To § 4246.

The government relies on a comparison of § 4248 to § 4246, the general federal civil commitment statute, arguing that Congress's new detention regime is merely a "modest expansion of a settled framework for federal civil commitment." U.S. Br. 39. Even if that were so, it would not diminish this Court's responsibility to ensure that the expansion passes constitutional muster. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack." (quoting *Williams v. Illinois*, 399 U.S. 235, 239 (1970))). However, the expansion here is not modest, and the framework is not settled.

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[20] The federal government has also limited civil commitment to individuals whose mental illness occurred as a direct result of the federal government's relationship with that individual. Congress limited the extension of custody at St. Elizabeth's for individuals outside of the District of Columbia or the armed forces to indigent recent retirees who had become insane "from causes which arose during and were produced by [military] service." Act of July 13, 1866, ch. 179, § 2, 14 Stat. 93, 94. And the original focus of federal civil commitment of prisoners was the "duty of the United States to take care of *convicts who may become insane while in her custody*." *Government Hosp. for the Insane*, 17 Op. Att'y Gen. 211, 212-13 (1881). Thus, federal civil commitment has traditionally focused on activity that occurred while an individual was under federal control or that resulted from the government's relationship with that individual. Section 4248, in contrast, focuses on conduct that occurred before entry into BOP custody and predictions about conduct that may occur after BOP custody.

Section 4246 and its predecessor have, since 1949, authorized commitment of three classes of individuals who are already hospitalized: (i) those deemed incompetent to stand trial for a federal crime, (ii) those against whom federal charges have been dismissed due solely to mental illness, and (iii) those whose criminal term of imprisonment is set to expire. By far the most significant number of people detained under § 4246 is the first group – individuals deemed incompetent to stand trial.[21] This Court has concluded that the federal government has the power to commit these individuals based on its unexhausted power to prosecute. *See Greenwood*, 350 U.S. at 375-76.

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[21] Since 2000, 104 individuals have been committed in the Eastern District of North Carolina under § 4246. 88 of those individuals (84.6 percent) were committed because they were incompetent to stand trial. *See 18 U.S.C. § 4246 Commitments in the Eastern District of North Carolina: 2000 to the Present*, The Zealous Advocate (Federal Public Defender, Eastern District of North Carolina), Fall 2009 Supp., *at* http://nce.fd.org/The%20Zealous%20AdvocateFall%202009%20Supplement-Review%20of%20§%204246%20Civil%20Commitment%20Cases%202000%20to%20the%20Present.pdf.

Commitment under § 4246 of individuals whose term of imprisonment is about to expire, on the other hand, remains an unsettled question. *See* Pet. App. 46a n.11 ("This court has not located a Supreme Court case specifically addressing the constitutionality of [§ 4246]."). If that statute is ever properly challenged before this Court, its application to post-sentence commitment may fall. Regardless of whether that day might come, the government cannot now establish the constitutionality of § 4248 by analogy to a different statute whose constitutionality has not been decided.

Moreover, the government is incorrect that § 4248 is only a "modest expansion" of federal civil commitment power. The district court, in properly declining to reach the constitutionality of a statute not before it, noted the expansiveness of § 4248 as compared to § 4246. "The very narrow group of people to whom § 4246 applies and the many restrictions within § 4246 recognizing the authority and reserved powers of state governments highlight the broad applicability, the breadth of purpose, and the extension of federal power represented by § 4248." Pet. App. 72a. Section 4248 was a conscious effort to expand the reach of federal civil commitment to people who would not have traditionally been considered mentally ill under § 4246. U.S. Br. 7 n.4 (citing H.R. Rep. No. 109-218, at 29, 54 (2005)). It applies to anyone in BOP custody rather than individuals already hospitalized and certified as mentally ill by the director of the facility, *see* Pet. App. 68a-69a, and it does not require the government to seek appropriate state care *before* commitment, *see id.* at 69a.

For these reasons, whatever the ultimate constitutionality of § 4246 in this setting, the statute is more circumscribed than § 4248. *Id.* Despite the government's assertions, § 4248 is an *immodest* expansion of an *unsettled* framework.

II. THE GOVERNMENT WAIVED ITS SEPARATE CHALLENGE TO MR. CATRON'S COMMITMENT.

One respondent, Shane Catron, was found incompetent to stand trial before the government could prosecute him for his alleged criminal offenses. The government initially moved to commit Mr. Catron pursuant to § 4246, but it later withdrew its § 4246 petition and certified him pursuant to § 4248.

Before the court of appeals, the government did not make a separate argument with respect to Mr. Catron or ask that he be treated differently from the other Respondents. The Fourth Circuit properly declined to consider an outcome the government had not sought, noting that when the parties do not ask for such "finely drawn" relief, a court should not embark on such a course. Pet. App. 19a (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330-31 (2006)).

Because the government waived this argument before the court of appeals, and the court of appeals specifically declined to address it, this Court should decline to do so as well. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (noting that argument "was not raised below, [so] it is waived"); *Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs*, 506 U.S. 153, 162 n.12 (1993) ("Petitioners did not raise the issue below and the Court of Appeals considered it waived. We do as well." (internal citation omitted)). This Court's practice of declining to consider issues that were waived in the courts below not only discourages bait-and-switch litigation tactics, but also implements the principle that "[t]his Court . . . is one of final review, 'not of first view,'" and therefore does not decide questions that were not decided by the court of appeals. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).

Even if the government's new argument concerning Mr. Catron were not waived, it would still fail. Like the defendant in *Greenwood*, Mr. Catron is currently incompetent to stand trial, and the government has an unexhausted power to enforce federal law against him. *See Greenwood*, 350 U.S. at 375. Unlike the defendant in *Greenwood*, however, Mr. Catron's detention is not directed to preserving this power. *Greenwood* permitted commitment "until the accused shall be mentally competent to stand trial," *id.* at 368 n.2 (quoting 18 U.S.C. § 4246 (1956)), because such commitment was intended to treat the disease that stood as an obstacle to enforcing federal law, and was thus "auxiliary" to that enforcement. *Id.* at 375. But *Greenwood* did not hold that any individual who may be detained for that purpose may also be detained for any other purpose. Section 4248 is not a means to preserving the government's power to prosecute Mr. Catron, but is instead a means to prevent violent crime.

Whereas § 4246 commitment may result in the restoration to competency and eventual prosecution of the committed individual, § 4248 commitment is not focused on restoration and prosecution. *See United States v. Volungus*, 599 F. Supp. 2d 68, 76 n.9 (D. Mass. 2009) ("[Section 4248] authorizes such a person to be held not because of the federal interest in the prosecution of a past offense, but because of the possibility of an as yet uncommitted future offense."). Indeed, although incompetence triggers Mr. Catron's detention, as long as he continues to be deemed "sexually dangerous," he may be detained even if he is restored to competence. *See* 18 U.S.C. § 4248(d). Although the government could have committed Mr. Catron in order to preserve its ability to prosecute him, *see id.* § 4246, it cannot constitutionally detain him simply to prevent him from committing state law crimes. *See supra* I.A.3.

CONCLUSION

The decision of the court of appeals should be affirmed.

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REPLY
BRIEF

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER
v.
GRAYDON EARL COMSTOCK, JR., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

As explained in our opening brief (at 2-3, 24-30), Congress has recognized since the nineteenth century the need for federal commitment of certain categories of persons, in distinctive relationships with the United States, who suffer from mental illness. In 1949, guided by the recommendations of a "conspicuously able committee" of the Judicial Conference, *Greenwood* v. *United States*, 350 U.S. 366, 373 (1956), Congress enacted a comprehensive framework for civil commitment by the United States of federal prisoners reaching the end of their sentences and of persons charged with federal offenses but deemed incompetent to stand trial, when they posed a significant risk of danger because of a mental illness or defect. Pet. Br. 4. The Judicial Conference and Congress recognized that the federal government assumes special obligations by virtue of exercising plenary custodial control over such persons, both to the individuals and to the public. In particular, the enactors understood that the federal government, in previously removing these individuals from the immediate control, and often the territory, of the States in which they had resided, often rendered those States unwilling or unable to assume responsibility for them upon release. For similar reasons, Congress expanded that framework in 1984 by providing for civil commitment of persons who are charged with federal crimes but found not guilty by reason of insanity, even though those persons are subject to neither pending federal charges nor any federal sentence. 18 U.S.C. 4243; see *Shannon* v. *United States*, 512 U.S. 573, 575-577 (1994).

Since 1990, 21 States have enacted civil-commitment statutes specifically tailored to individuals who suffer from mental disorders that make them likely to engage in sexually violent acts. Pet. Br. 39; Kansas et al. Amici Br. 1-2. In 2006, Congress followed suit, supplementing the established framework for federal civil commitment of certain individuals already in federal custody by adding 18 U.S.C. 4248, which specifically addresses the release from federal custody of persons who would, as a result of a "serious mental illness, abnormality, or disorder," have "serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. 4247(a)(6); see 18 U.S.C. 4248(a). Section 4248 authorizes the federal government to seek the court-ordered civil commitment of such persons, and—just like other provisions dating back to 1949—expressly allows commitment to extend beyond the end of the criminal sentence or beyond the custodial period otherwise permitted for persons found incompetent to stand trial.

Contrary to respondents' submission, Section 4248 falls well within Congress's powers under Article I, Section 8 of the Constitution. Pursuant to its enumerated powers over such subjects as interstate commerce and federal taxing and spending—and its authority under the Necessary and Proper Clause to carry those powers into effect—Congress may enact laws establishing criminal offenses and may provide for a criminal justice and penal system under which the United States takes custody of persons charged with and convicted of those crimes. Respondents do not contend otherwise. Section 4248, like the statutory framework enacted in 1949 and supplemented in 1984, is a reasonable incident to the creation and maintenance of that criminal justice and penal system, ensuring that it operates to serve rather than frustrate its intended purposes. Section 4248 is therefore likewise within Congress's Article I powers.

Respondents are correct in contending that civil commitment of the mentally ill is generally a matter for the States, and not for the federal government. But respondents err in failing to recognize the unique relationship and special responsibilities that arise when the federal government indicts and takes into custody a defendant who is found incompetent to stand trial, or when it prosecutes and convicts a defendant and commits him to federal custody to serve a sentence. As the amicus brief filed on behalf of 30 States concludes in discussing the roles of the States and federal government respecting such persons (at 20): "Where the federal government has lawful custody of an individual who is both dangerous and suffering from a mental abnormality, the federal government cannot be constitutionally powerless to provide for the commitment, care, and treatment of that person[.]"[1]

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[1] One amicus brief supporting respondents (National Ass'n of Crim. Def. Lawyers 2-30) raises only due process questions about Section

A. Congress's Enumerated Powers Are Appropriately Advanced By Section 4248, Which Is A Rational Incident Of Custody Over Federal Prisoners

Respondents advance an artificially limited view of the Necessary and Proper Clause and incorrectly portray Section 4248 as too far removed from Congress's Article I powers even though it is an "appropriate" means of ensuring the "legitimate" end of operating a safe and effective criminal justice and penal system (for all the purposes such a system is designed to serve). *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). They also claim that Section 4248 is a novel expansion of federal power, but in doing so they overlook the 1949 overhaul of the statutory framework dealing with mentally ill persons in federal custody as well as similarly motivated statutes dating back to the nineteenth century. All of those historic precedents illustrate why Congress has provided for the commitment of certain federal prisoners with mental disorders "whom it is not safe to let at large" and for whom "no state will assume responsibility." *Greenwood*, 350 U.S. at 374 (quoting Judicial Conference Committee Report); see J.A. 69, 73 (reprinting report).

4248. This Court appropriately declined respondents' request to add a due process question to this case at the certiorari stage, see Br. in Opp. 17; Cert. Reply Br. 8-10, and respondents acknowledge that their Fifth Amendment claim is "not at issue before this Court" and was not reached by the court of appeals, Resp. Br. 43 n.18.

1. Congress may effectuate an enumerated power through the combination of several measures under the Necessary and Proper Clause

Respondents are of course correct in stating that the Necessary and Proper Clause must operate in conjunction with other powers granted by the Constitution. Where respondents err is in contending that there is an insufficient connection between Section 4248 and Congress's enumerated powers. A commitment under Section 4248 is justified by the Necessary and Proper Clause in combination with whatever enumerated power or powers supported the federal prosecution and custody of the individual in the first instance.

As explained in our opening brief (at 23), the Necessary and Proper Clause authorizes Congress to enact criminal statutes prohibiting and punishing certain conduct, and that power includes authority to imprison or otherwise provide for the custody or supervised release of indicted or convicted offenders. Respondents do not dispute those propositions. Instead, respondents would prevent Congress from taking the additional step—in furtherance of the operation of the federal penal system and the custodial responsibilities associated with it—of providing for the civil commitment of a federal prisoner who is mentally ill and dangerous. They claim that the connection between that measure and Congress's enumerated powers rests on "linking remote implications together" and so is too attenuated to bring the Necessary and Proper Clause into play. Resp. Br. 16.

In making that argument, respondents and one of the amicus briefs in their support invoke James Madison and Thomas Jefferson. See Resp. Br. 16; Cato Inst. & Prof. Barnett Amici Br. 18. Although those two figures are often reliable guides to the Constitution's meaning, this Court never adopted their proposed construction of the Necessary and Proper Clause. See *M'Culloch*, 17 U.S. at 413-421; *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805); see also Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. Rev. 745, 762 (1997) ("Of course, it was the opinion of Marshall, the Supreme Court Chief Justice, not Madison, that prevailed on this question of how to interpret 'necessary.'").

Since *M'Culloch*, it has not been plausible to claim, as Madison did, that Congress lacks the power to charter a national bank because "implications" supporting the need for such a bank to effectuate Congress's enumerated powers cannot be "linked together." 2 Annals of Cong. 1899 (1791); Resp. Br. 16. Similarly, notwithstanding Jefferson's objection, quoted by amici Cato Institute and Professor Barnett (Br. 18), there can be no doubt that Congress may indeed provide for the incorporation of a mining company to produce materials to build ships to support the national defense, notwithstanding the several links in this chain between the company and the Navy.

Just as the Court has "rejected the view that the Necessary and Proper Clause demands that an Act of Congress be *absolutely* necessary to the exercise of an enumerated power," *Jinks* v. *Richland County*, 538 U.S. 456, 462 (2003) (internal quotation marks omitted), it has rejected the associated view that Congress's choice of means is limited to those "which are most direct and simple," 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1240, at 115 (1833). As a result, this Court has upheld statutes that could only be justified on the basis of a chain involving more than one link, in which one implied power supported and operated in conjunction with another. For example, in *United*

States v. *Hall*, 98 U.S. 343 (1879), the Court upheld a statute making it a federal crime to embezzle or fraudulently convert funds for a military pension even after they had left the federal government's possession. The power to create the pension was implied by Congress's powers to "declare war, raise and support armies, provide and maintain a navy, and make rules for the government and regulation of the land and naval forces." *Id.* at 351. And if Congress had the implied power to create the pension, it necessarily had the further implied power to define and punish a specific kind of fraud associated with that pension. Similarly, in *Greenwood* the Court sustained the exercise of an unenumerated power of indefinite commitment pursuant to another unenumerated power to prosecute someone for a federal crime. See Resp. Br. 3-4 ("'the power to criminalize and punish certain conduct' and 'the power to prosecute'" are not enumerated") (quoting Pet. App. 34a).[2]

Congress also must have the power to take steps to address the consequences of actions that the federal government has taken pursuant to Congress's enumerated and implied powers. Thus, for instance, this Court upheld Congress's tolling of statutes of limitations governing state-law causes of action in state courts as a measure necessary to remedy consequences produced by Congress's exercise of its war powers. See *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493, 507 (1871); see also

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[2] See also *Jacob Ruppert* v. *Caffey*, 251 U.S. 264, 282, 299-301 (1920) (upholding power to prohibit production of *non*-intoxicating liquor in aid of Congress's implied power to prohibit production of intoxicating liquor as part of implied war power to "promote the Nation's efficiency in men, munitions and supplies"; describing prior cases demonstrating there is "no basis" to distinguish "between the scope or incidents of an express power and those of an implied power").

Jinks, 538 U.S. at 462-463 (discussing same); cf. *United States* v. *Kagama*, 118 U.S. 375, 384 (1886) (holding that the federal government's "power" to protect the Indians "arises [from] the duty of protection" that was created because the federal government's "course of dealing * * * with them" led to their "helplessness").

There are, to be sure, limits on what Congress may do pursuant to the Necessary and Proper Clause, but those limits come from the requirement that the means chosen by Congress be "consist[ent] with the letter and spirit of the [C]onstitution," *M'Culloch*, 17 U.S. at 421, and that they be rationally related to a legitimate end, *Sabri* v. *United States*, 541 U.S. 600, 605 (2004). The Clause's limits cannot be defined by a formulaic insistence that a chain of implications can have only one link. As this Court has recognized: "If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone." *Burroughs* v. *United States*, 290 U.S. 534, 547-548 (1934).

Respondents make no effort to reconcile their arguments with the means-ends-rationality standard this Court described in *Sabri*. Instead, respondents contend only that the commitment of a prisoner who is about to be released is "separate and distinct" from the power justifying federal custody in the first instance. Resp. Br. 18. But that assertion does no more than assume the conclusion, resting on characterizations and labels rather than an assessment of whether Congress could reasonably find a sufficient nexus between the criminal custody of respondents and their civil commitment.

In fact, the implied power to establish a penal system includes the powers of performing the many functions appropriate to the responsible operation of that system. Among those functions are some deriving from the assumption of custody—and removal from the purview of the States—of certain mentally ill and dangerous persons. In particular, as discussed below, Congress has for many decades taken the view that federal custody of such persons appropriately entails a mechanism enabling their civil commitment as their criminal sentences come to a close.

2. Consistent with the government's custodial responsibilities, Section 4248 reasonably addresses the release of those who pose a significant danger as a result of a serious mental condition

Respondents contend that Section 4248 marks a radical break with prior understanding of the federal government's responsibilities in operating the criminal justice and prison systems, claiming (Br. 52) that there is "no historical precedent" for the provision. But an appeal to history in fact shows the rootedness of Section 4248 in a long legislative tradition. The closely related commitment authority in Section 4246 has been on the books for 60 years. And even that provision had links to earlier statutes that provided for the custody and treatment of certain mentally ill persons for whom the federal government had special responsibilities. See Pet. Br. 2-3, 24-29.

Respondents attempt to minimize the pre-1949 statutory history by describing the provisions involved as limited to members of the military or residents of the District of Columbia. Br. 12, 50. Those statutes, however, in fact applied more broadly, to other categories of people with whom the United States had a distinctive relationship. See Pet. Br. 24-25 & n.9 (citing statutes providing for commitment of Foreign Service personnel and employees, beneficiaries of the Bureau of Indian Affairs, and United States citizens adjudged insane in Canada); see also, *e.g.*, *De Marcos* v. *Overlholser*, 122 F.2d 16, 17 (D.C. Cir.) (approving continued federal commitment of U.S. citizen accepted from Canadian government when Tennessee was unwilling to institutionalize him), cert. denied, 314 U.S. 609 (1941); J.A. 71 (Judicial Conference Committee Report) (observing that under the pre-1949 statutory regime, "in many cases courts have acted on the broader interpretation that the sections authorize committal of any insane person charged with a federal crime"). Respondents correctly note (Br. 50-51) that the pre-1949 statutes were generally not construed as permitting federal commitment past the end of a federal criminal sentence. But that limitation derived from the language of the statutes at issue and, in particular, their failure to provide, as required by due process, for "notice and [a] proper hearing" at which to consider the necessity of further confinement. *Commitment to Gov't Hosp. for the Insane*, 30 Op. Att'y Gen. 569, 571 (1916). The limitation did not reflect a conclusion that the federal government, if acting in accord with statutory authorization and due-process requirements, lacked the power to hold individuals for non-punitive reasons. See Pet. Br. 3.

Respondents also fail to acknowledge the reasons that Congress enacted the seminal 1949 legislation, which this Court described as the product of "long study by a conspicuously able committee [of the Judicial Conference], followed by consultation with federal district and circuit judges." *Greenwood*, 350 U.S. at 373. The committee's report explained the "serious problem" that had arisen in many instances when the federal government was due to release from lawful custody an individual "whom it is not safe to let at large." J.A. 73, 69; see *Greenwood*, 350 U.S. at 373-374 (discussing the committee's report). That "serious problem" arose in part from special attributes of the federal penal system, which can sever the ties between an inmate and his prior residence. See Pet. Br. 40-41. As the House Report accompanying the 1949 legislation observed, an "appreciable number" of federal prisoners were too dangerous to be released but "lack[ed] * * * legal residence in any State." H.R. Rep. No. 1319, 81st Cong., 1st Sess. 2 (1949) (quoting statement submitted by James V. Bennett, BOP Director). Noting that federal prisoners are generally released at the place of conviction, the House Report observed that requiring the release of persons who "constitute a menace to public safety" in those places, where prisoners might lack any connection, could place an "unfair burden upon the community." *Ibid.* (quoting BOP Director Bennett).

Congress again responded to similar concerns 35 years later, when it enacted 18 U.S.C. 4243, which authorized the commitment of federal defendants (outside the District of Columbia) who were found "not guilty only by reason of insanity." See Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 403(a), 98 Stat. 2059-2061. As the Senate Report explained, up to that point, the only way for federal officials to "obtain civil commitment" of such acquittees was "by urging local authorities to institute such proceedings." S. Rep. No. 225, 98th Cong., 1st Sess. 241 (1983). But "such efforts [we]re rarely successful largely due to a lack of sufficient contacts between the acquitted defendant and the individual State for the latter to be willing to undertake responsibility for him." *Ibid.*; see also *Shannon*, 512 U.S. at 575-577 ("Reliance on state cooperation was at best a partial solution to a serious problem * * * and federal courts time and again decried this gaping statutory hole.") (internal quotation marks and modifications omitted).[3] Congress thus again determined that the function of federal law enforcement entailed certain authorities relating to civil commitment.

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[3] As respondents' brief quotes at length (at 49-50), several years before Section 4243 was enacted, the House Judiciary Committee explained its decision not to propose a general provision for federal commitment of federal defendants acquitted on grounds of insanity. The committee, in addition to identifying constitutional concerns, prominently relied on the argument that "[o]nce the Federal Government takes on the task of caring for the dangerously mental ill that become involved in the Federal criminal system, Congress would most likely be asked to expand the Federal role even further." H.R. Rep. No. 1396, 96th Cong., 2d Sess. 561 (1980). Although the D.C. Circuit later described that committee report as a "well considered analysis," the court expressly noted that the committee had "draw[n] no firm conclusion" about "whether Congress has the constitutional authority to provide for a nationwide federal commitment procedure." *United States* v. *Cohen*, 733 F.2d 128, 137 (1984) (en banc) (Scalia, J.). In enacting Section 4243 in 1984, Congress effectively rejected the conclusion of the 1980 House Committee. A quarter of a century later, no court—including this Court in *Shannon*—appears to have questioned Congress's power to provide for federal civil commitment of insanity acquittees, even though that commitment cannot rest on any unexhausted power to prosecute. And the practical consequences that the committee feared have not come to pass: The federal government has not been allowed, as the committee feared, "to take over State mental health institutions, or to accept the transfer of those incarcerated there, when the State is allegedly not doing a satisfactory job." H.R. Rep. No. 1396, *supra*, at 561. Nor could the addition of Section 4248—which is carefully limited to persons already in federal custody, 18 U.S.C. 4248(a)—permit such a takeover.

As explained in our opening brief, the factors that tend to diminish States' responsibility for federal prisoners remain significant today. See Pet. Br. 40-41 (describing features of federal custody, including placement in facilities around the country, release in place of former residence or place of conviction, and risks of statelessness). Even today, 14 States have no federal BOP facilities. And individuals who suffer from mental defects requiring special treatment must often be transferred within the federal system, because only five Federal Medical Centers within the BOP provide psychiatric services and only six facilities have sex-offender management and treatment programs.[4] See Pet. Br. 41 n.15; see also *United States* v. *Tom*, 565 F.3d 497, 506 (8th Cir. 2009) ("We must also consider the fact that many, if not most, federal sex offenders are * * * incarcerated outside the state of their domicile or the state in which they were convicted."), petition for cert. pending, No. 09-5818 (filed Aug. 6, 2009).

In enacting Section 4248, Congress reasonably addressed those and other consequences of the federal government's decision to place certain individuals in custody. And, as in 1949 and 1984, Congress did so by providing that the federal government would continue to provide care and custody for individuals with serious mental problems who were dangerous and for whom no States were willing to assume responsibility.

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[4] In addition, sex offenders have a proclivity for "mov[ing] across state lines following their release from federal custody" (Kansas et al. Amici Br. 11-12), which may diminish any particular State's willingness to assume responsibility for them.

3. *Section 4248 is consistent with traditional understandings of the duties associated with a custodial role*

It is unsurprising that Congress has recognized so often that the federal government's decision to take an individual into custody triggers special obligations. That view is consistent with traditional notions of custodial responsibility reflected in common-law principles. See Pet. Br. 32 (citing Restatement (Second) of Torts § 319 (1965) ("One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.")).

Respondents contend (Br. 24) that such principles are inapplicable to a custodian's release of a dangerous, mentally ill person, relying on cases holding that when a custodian has no lawful authority to confine, he also has no duty of care. But here the very question is whether Congress has permissibly conferred that authority because of the inmate's mental condition and capacity to harm. The common-law principle set forth in the Restatement reflects a widely shared understanding of responsible conduct, which also underlies Congress's enactment of Section 4248. That understanding demonstrates why Congress could find it appropriate—and therefore necessary and proper—to provide the federal government with certain civil-commitment authority incidental to its custodial responsibilities.[5]

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[5] One of the cases respondents cite (Br. 24) in fact underscores the special nature of the relationship between a prisoner and his custodian. See *Lamb* v. *Hopkins*, 492 A.2d 1297, 1302 (Md. 1985) (concluding probation officers owed no duty of care because they "did not meet the

Respondents thus mistake the government's reference to tort principles as an argument that "[c]ommon law duties * * * create federal power." Resp. Br. 9. Instead, the common-law principles are relevant here because they illustrate the common-sense basis of Congress's conclusion that the federal government's custodial relationship with an ill and dangerous person may require it to assume special responsibilities for the conduct of that person, including if he were to be released. Other illustrations come from this Court's cases, which recognize that the government has a constitutional "duty to assume responsibility for [an individual's] safety and general well-being" when it takes him "into its custody and holds him there against his will," and acknowledge the force of additional "affirmative duties" that can arise under tort law when the government has a "special relationship[]" with an individual. *DeShaney* v. *Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199-200, 201-202 (1989) (internal quotation marks and citation omitted); see also Pet. Br. 25-26 (quoting cases and Attorney General opinion referring to the federal government's "duty" to care for insane persons in its custody).

Respondents purport (Br. 27-28) to discern no differences in kind or degree between the relationship of the federal government with an ill and dangerous prisoner it is about to discharge and its relationship with a recipient of Social Security, Medicare, or Medicaid benefits, or a federal employee. Although Congress may protect the beneficiaries of its programs and its employees in

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threshold requirement of taking charge of the probationer within the meaning of [Restatement] § 319," which is "typically" met when an individual is placed in "custody," as with "a correctional institution incarcerating a dangerous criminal, or a mental institution confining a dangerous patient") (citation omitted).

certain ways,[6] the federal government's connection to them—and particularly, its responsibility for their custody and conduct—are worlds apart from the relationship between a jailor and prisoner. There is no common-law or common-sense understanding that providing a financial benefit to someone triggers the same kinds of duties (to that person or to others) that taking someone into involuntary custody does—or indeed that it triggers any extensive set of responsibilities at all. See *DeShaney*, 489 U.S. at 201 ("[T]he State does not become the permanent guarantor of an individual's safety by having once offered him shelter."). Congress surely can make such sensible distinctions in undertaking the analysis for means-ends rationality prescribed in *Sabri* and determining what measures are necessary and proper to effectuate Congress's enumerated powers.[7]

4. *This Court's decision in* Greenwood *supports the constitutionality of Section 4248*

As discussed in our opening brief (Pet. Br. 33-35), *Greenwood* upheld the indefinite commitment of a defendant who had never been convicted of a federal crime and who would, in all likelihood, never be competent to stand trial. 350 U.S. at 370, 374-375 (noting that mental condition was not merely temporary). The Court approved that commitment pursuant to the 1949 statute that authorized the commitment of a mentally ill and dangerous prisoner "whose sentence [wa]s about to expire," 18 U.S.C. 4247 (1952), which the Court construed to apply as well to persons held under 18 U.S.C. 4246 (1952) based on mental incompetence. See 350 U.S. at 368-369, 374. In accordance with 18 U.S.C. 4247 and 4248 (1952), Greenwood was entitled to release if and only if his mental condition improved such that he no longer posed a danger. See *Jackson* v. *Indiana*, 406 U.S. 715, 732 (1972) (explaining that "Greenwood was entitled to release when no longer dangerous").

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[6] See, *e.g.*, *Hall*, *supra* (upholding a statute making it a federal crime to embezzle funds from a military pension); 18 U.S.C. 111, 1114 (making it a federal crime to kill or assault federal employees or officers).

[7] Contrary to respondents' contention (Br. 27), *Reid* v. *Covert*, 354 U.S. 1 (1957), did not "reject[]" the proposition that the government can "regulate [an] activity when it is done by a person with 'connections' to the federal government." Instead, *Reid* rejected only a specific means of regulation—courts-martial for civilians who were not members of the armed forces—on the basis of several constitutional provisions, including the Grand Jury Clause of the Fifth Amendment. 354 U.S. at 22-23 (plurality opinion).

Under respondents' reading of *Greenwood*, civil commitment extending beyond the end of a prison term or maximum potential sentence may be proper when a defendant has been found incompetent to stand trial and charges against him remain pending, but is outside Congress's authority once a defendant has been tried and convicted. (Respondents do not address whether federal commitment is permissible after a defendant has been acquitted on grounds of insanity, as authorized by 18 U.S.C. 4243.)

Respondents' reading is supported neither by *Greenwood* nor by subsequent cases. As the Court explained in *Jackson*, indefinite commitment based exclusively on incompetency likely could not "survive constitutional scrutiny."[8] 406 U.S. at 733. The commitment in *Greenwood* survived because it relied on the finding "that Greenwood would be dangerous if not committed." *Id.*

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[8] The Court later held that, under the Due Process Clause, "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom." *O'Connor* v. *Donaldson*, 422 U.S. 563, 576 (1975).

at 732. The disputed commitment in this case relies on a similar finding. Indeed, as the brief of the amici States points out (Kansas et al. 20), the federal government's appropriate authority over the "person in custody is, if anything, much *stronger* in the current case" than in *Greenwood*, because four of the respondents have been convicted of federal crimes and served federal prison sentences.[9]

Courts of appeals have followed *Greenwood* and *Jackson* in sustaining the federal civil commitment of defendants held prior to trial for longer periods than their maximum potential terms of imprisonment. Those holdings have been based on a showing of the illness and dangerousness of the person in custody. See *United States* v. *Sahhar*, 56 F.3d 1026 (9th Cir.), cert. denied, 516 U.S. 952 (1995) (sustaining commitment on the basis of federal custody and a finding of future dangerousness); *United States* v. *DeBellis*, 649 F.2d 1, 2-3 (1st Cir. 1981) (holding that the ongoing civil commitment of a defendant could be justified only by a finding that he posed a danger to himself or others by reason of his mental illness).[10] Section 4248 authorizes civil commitment of persons in custody for reasons and in circumstances not materially different. Longstanding caselaw thus supports the actions at issue.

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[9] Congress carefully calibrated the extent of the federal government's duties and interests with respect to different categories of individuals, declining to provide for continued commitment when a defendant is not convicted and charges are dismissed for reasons unrelated to his mental condition. 18 U.S.C. 4246(g), 4248(g).

[10] Unlike the defendant in *Jones* v. *United States*, 463 U.S. 354 (1983), the defendants in *Sahhar* and *DeBellis* were, as respondents note (Br. 21 n.6), not insanity acquittees. But, as explained in our opening brief (at 37), those decisions were not premised on the non-exhaustion of federal prosecutorial power. The court in *Sahhar* found that the defendant's commitment was justified "because he was in *federal* custody, not because he was in *pretrial* custody." 56 F.3d at 1029. And the court in *DeBellis* "express[ed] no opinion" about whether the power to prosc-

B. Section 4248 Does Not Improperly Intrude On The States' Police Powers

1. Respondents contend (Br. 34) that Section 4248 is tantamount to a congressional assertion of a "general power to regulate all sexual violence." As discussed in our opening brief (at 43-44), however, that assertion is fundamentally mistaken. Section 4248 includes a kind of jurisdictional element ensuring that each case brought under it is an appropriate subject for the exercise of federal power. Section 4248(a) limits the statute's application to individuals who are already "in the custody of the Bureau of Prisons" or "committed to the custody of the Attorney General pursuant to [18 U.S.C.] 4241(d)" or "against whom all [federal] criminal charges have been dismissed * * * for reasons relating to the [person's] mental condition." As a result, the section applies only when the federal government has a close connection to the person committed and a strong interest in and responsibility for regulating that person's conduct. In enacting Section 4248, Congress thus respected the Constitution's underlying distinction between the national and the local, included a federal jurisdictional nexus to maintain that distinction, and refrained from asserting anything like "a general police power." *United States* v. *Lopez*, 514 U.S. 549, 567 (1995).

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cute had been exhausted by the length of pretrial detention. 649 F.2d at 2. Moreover, as discussed above (see note 3, *supra*), we are aware of no case concluding that Congress lacks the power to provide for federal civil commitment of those found not guilty by reason of insanity, even though the power to prosecute is necessarily exhausted at that point.

2. a. Respondents' implicit invocation of the Tenth Amendment is equally inapposite. Resp. Br. 37-47. It is of course true that Congress may not "commandeer" a State's legislative process, *New York* v. *United States*, 505 U.S. 144, 161 (1992), or "conscript[]" state officers to implement federal directives, *Printz* v. *United States*, 521 U.S. 898, 935 (1997). But Section 4248 does not "authorize[]" the federal government "to regulate the police" of a state or locality. Resp. Br. 36 (quoting Alexander Hamilton's Opinion on the Constitutionality of a National Bank). To the contrary, like earlier federal civil-commitment provisions, it seeks to prevent the dangers posed by the release of a sexually dangerous federal inmate and avoid placing an "unfair burden upon the community where [his] release is effected," H.R. Rep. No. 1319, *supra*, at 2 (quoting statement of BOP Director Bennett), while preserving the ability of the State in which the person was convicted or previously resided to assume responsibility for him and his conduct. As 30 amici States conclude in their brief: "[T]he federal program at issue in this case in no way intrudes on traditional state police power prerogatives." Kansas et al. 6-7.[11]

b. Respondents' suggestion (Br. 40-41) that Section 4248 does not accord with the "etiquette of federalism" is particularly misplaced. Both Section 4246 and Section 4248 require that the Attorney General transfer an individual to state custody if the State in which he was tried or resided is willing to provide appropriate care. 18 U.S.C. 4246(d); 18 U.S.C. 4248(d).

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[11] When Congress enacted Section 4248, it also provided for funding to States "for the purpose of establishing, enhancing, or operating effective civil commitment programs for sexually dangerous persons." Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 301, 120 Stat. 617-618 (42 U.S.C. 16971).

Respondents find that structure constitutionally flawed because state law might not provide for the detention of mentally ill and sexually dangerous persons. Thus, respondents declare that "States are powerless to prevent the detention of their citizens under [Section] 4248, even if detention is contrary to the States' policy choices." Resp. Br. 11; see also *id.* at 41-43.

That objection seems, at best, highly conjectural. It has not been previously raised in this litigation, and no State has criticized the statute on that basis. To the extent the argument has any bite, it comes from the suggestion that in enacting Section 4248, Congress has attempted to supplant generally applicable state law. But in fact Congress has done nothing of the kind. Section 4248 applies in limited circumstances, to persons who are distinctively situated in relation to both federal and state authorities. Any individual in this class is not merely "one of [a State's] citizens." Resp. Br. 42. Indeed, it is precisely because federal custody often removes individuals from and severs their connections with their States that Congress first enacted civil-commitment provisions for persons reaching the end of their federal sentences. Such provisions ensure that States need not choose between assuming responsibility for a dangerous person with whom they have no substantial connection and allowing that person to be released into the general population.[12]

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[12] Respondents also misapprehend the operation of Section 4248(d), which requires that a committed person be turned over to state custody when an appropriate authority will assume responsibility. Contrary to respondents' suggestion (Br. 40-41), even a State that has received an inmate pursuant to a conditional release need not detain him indefi-

Moreover, as explained in our opening brief (at 46 & n.18), there is nothing novel or constitutionally significant about asking a State whether it is willing to assume responsibility for an individual after a court has determined, at the federal government's behest, that he is subject to commitment. The federal government would indeed impose a greater burden on the State by requiring a decision before commitment proceedings had taken place. In that event, the State would have to shoulder the burden of proving to the relevant court that the individual meets the standards for commitment. It is especially reasonable to reject that distribution of labor when the individual has been in federal custody, removed from the general population of the State, and subjected to psychological evaluations by federal personnel.

c. Respondents acknowledge that Section 4248 and the longstanding Section 4246 alike apply to persons (such as respondents) who are completing federal prison sentences or who have been charged with federal crimes and held for the maximum period allowed by 18 U.S.C. 4241 on account of mental incompetence. They nonetheless attempt to "contrast" Section 4248 with Section 4246, pointing out that Section 4248 "is not limited to individuals who have been hospitalized and certified as mentally ill, and it does not require the federal government to seek appropriate state care before pursuing

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nitely if it concludes that other treatment alternatives will not jeopardize the public safety. The State can propose an alternative to the court that authorized commitment and take any steps approved by the court. See 18 U.S.C. 4248(e). Moreover, if a State has been authorized to commit the person under state law, the federal government cooperates in seeking to dismiss the Section 4248 action, thus ceding jurisdiction to the State.

federal commitment." Resp. Br. 12; see also *id.* at 54-55. But Section 4248 requires proof of a "serious mental illness, abnormality, or disorder," see 18 U.S.C. 4247(a)(6), of the kind warranting commitment when combined with proof of dangerousness, see *Kansas* v. *Hendricks*, 521 U.S. 346, 357-360 (1997); see also Pet. Br. 6 n.4 (explaining Congress's intention that the standards under Section 4248 be substantively similar to those approved in *Hendricks*). And respondents offer no reason to think that the extent of Congress's Article I powers hinges on the difference between a Section 4246(a) certification by "the director of a facility in which [the] person is hospitalized" and a Section 4248(a) certification by an individual authorized by the Attorney General or the Director of the BOP. In practice, the certification processes under Section 4248 and Section 4246 are equally focused on medical concerns.[13]

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[13] When BOP identifies an inmate as a potential candidate for commitment under Section 4246, he is evaluated at one of BOP's psychiatric referral centers. Four Federal Medical Centers provide psychiatric services to male inmates, and one treats female inmates. Based on the reports of medical personnel, the warden (as the "director" of the facility) may certify an individual for commitment under Section 4246. When BOP identifies an inmate as a potential candidate for commitment under Section 4248, he is ordinarily evaluated at one of BOP's facilities in Butner, North Carolina. The individual authorized by the BOP Director to make certifications under Section 4248(a) is the Chairperson of the Certification Review Panel (CRP), which manages review of relevant materials, including psychological reports. See J.A. 40, 43, 46, 49 (certifications by Dr. William T. Bickart, a psychologist and Interim Chairperson of the CRP); J.A. 52 (certification by Dr. Paul Sahwell, also a psychologist and Interim Chairperson).

C. Section 4248's Application To Individuals Charged With Federal Offenses But Found Incompetent To Stand Trial Is Constitutional

Respondent Catron was not nearing the end of a federal term of imprisonment when the Section 4248 proceeding against him began. Instead, he had been charged with multiple counts of aggravated sexual abuse of a minor and then found incompetent to stand trial. Pet. App. 25a n.2. As a result, the Section 4248 proceeding against him was based on the statute's application to persons "who ha[ve] been committed to the custody of the Attorney General pursuant to [S]ection 4241(d)." 18 U.S.C. 4248(a); see J.A. 43 (certification).

1. The court of appeals described Catron's circumstances as "seemingly unique" and "differ[ing] greatly from those" of the other respondents. Pet. App. 19a n.10. Nevertheless, it "decline[d]" to "bifurcate Catron's unique challenge to [Section] 4248," on the purported ground that "no party" had "ask[ed] for such 'finely drawn' relief." *Ibid.* (quoting *Ayotte* v. *Planned Parenthood*, 546 U.S. 320, 330-331 (2006)).

Respondents contend (Br. 55) that this Court should not consider Section 4248's application to Catron because, in the court of appeals, "the government did not make a separate argument with respect to Mr. Catron or ask that he be treated differently from the other Respondents." As explained in our opening brief (at 50), however, that characterization of the government's position in the court of appeals is incorrect. The government appealed a district court decision holding the statute unconstitutional as applied to Catron, and the court of appeals consolidated Catron's case with those of the other respondents. J.A. 53-54. In the court of appeals, the government's briefs included separate discussions of the constitutionality under *Greenwood* of Section 4248 as applied to "individuals, like respondent Catron, found incompetent to stand trial and committed to federal custody under § 4241(d)." J.A. 56 (capitalization modified).[14] And in this Court, the second part of the question on which certiorari was granted is specifically devoted to the constitutionality of Section 4248 as applied to persons—such as Catron—"who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial."

2. On the merits, respondents' attempt to distinguish Catron's case from *Greenwood* fails. Respondents contend (Br. 56) that *Greenwood* allowed for commitment "to treat the disease that stood as an obstacle" to prosecuting Greenwood but did not permit commitment "for any other purpose." That theory rests on a misreading of *Greenwood* and the underlying statutes. Although the petitioner in *Greenwood* was found incompetent to stand trial, his continued commitment was based on the separate determination that, "if released, he would probably endanger the safety of the officers, property, or other interests of the United States." 350 U.S. at 372; see also *id.* at 369 n.4 (quoting 18 U.S.C. 4248 (1952)). As this Court later explained in *Jackson*, "Greenwood was entitled to release when no longer dangerous * * * even if he did not become competent to stand trial[.]" 406 U.S. at 732. Accordingly, respondents err in claiming that *Greenwood* allowed continued custody only for the purpose of enabling future prosecution.

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[14] The relevant portions of the government's briefs are reprinted at J.A. 56-59 (opening brief) and J.A. 89-90 (reply).

Like the court of appeals (Pet. App. 19a n.10), respondents apparently concede (Br. 57) that Catron can be constitutionally committed pursuant to 18 U.S.C. 4246. There is, however, no distinction between Sections 4246 and 4248 with regard to the length of a potential commitment. Under both provisions, the individual is to be placed in a suitable facility for treatment until the "earlier" of two events occurs: (1) a State agrees to assume responsibility; or (2) a court determines that his release or conditional release would no longer pose the danger to others that led to the commitment. 18 U.S.C. 4246(d)(1) and (2), 4248(d)(1) and (2). And if the individual is restored to competency prior to that time, the prosecution may proceed and any future custody would then depend on the course of the prosecution.[15] Commitment under Section 4248 of Catron—as an individual found incompetent to stand trial—is therefore constitutional.

* * * * *

The only issue in this case concerns federal power. Respondents acknowledge (Br. 43 n.18) that no due process claims are before this Court. Were respondents presently confined under a state statute directly analogous to Section 4248, they would now have no constitutional complaint. The question therefore is whether the federal government can exercise powers of civil commitment of mentally ill and sexually dangerous persons of the kind any State could exercise, when (but only when) those persons are currently in the custody of the federal government for being charged with or convicted of committing federal criminal offenses.

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[15] If the custodian of the facility in which the individual is detained submits "a report stating that the defendant is presently competent to stand trial," the court could "treat the report as a certification filed pursuant to [S]ection 4241(e)." S. Rep. No. 225, *supra*, at 237. That would enable the court to terminate hospitalization and "set the date for trial or other proceedings." 18 U.S.C. 4241(e). But that is not a possibility for Catron at this time, because respondents acknowledge he "is currently incompetent to stand trial." Resp. Br. 56.

The answer to that question is yes. Necessary and proper to the enforcement of federal criminal law and to the operation of a federal penal system are certain incidental powers, including resort to civil commitment of ill and dangerous persons who could pose a threat to the public if released. That authority, far from resembling any general police power, is tied to a specific federal responsibility and interest in the condition and conduct, present and future, of persons held in the federal penal system. And the exercise of that authority imposes no burden—indeed, is specifically designed to alleviate an otherwise significant burden—on the States. Respondents should be subject to the civil commitment standards and procedures of Section 4248.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ELENA KAGAN
Solicitor General

NOVEMBER 2009

AMICUS CURIAE BRIEF

No. 08-1224

Supreme Court
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13805

In The
Supreme Court of the United States

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UNITED STATES OF AMERICA,

Petitioner,

v.

GRAYDON EARL COMSTOCK, JR., *et al.*,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

◆

CONSOLIDATED BRIEF OF THE CATO INSTITUTE AND PROF. RANDY E. BARNETT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and publishes the annual *Cato Supreme Court Review*. It also files *amicus* briefs with the courts, including in cases focusing on the Commerce Clause and the Necessary and Proper Clause such as *United States v. Morrison*, 529 U.S. 598 (2000), *Gonzales v. Raich*, 545 U.S. 1 (2005), and *Baylor v. United States*, 517 F.3d 899 (6th Cir. 2008), *cert. denied*, 128 S.Ct. 2982 (2008). The present case centrally concerns Cato because it represents yet another attempt by the federal government to overstep its constitutional powers.

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[1] In conformity with Supreme Court Rule 37, *amici* have obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk. *Amici* also state that counsel for a party did not author this brief in part or in whole; and no person or entities other than *amici*, its members, and counsel made a monetary contribution to the preparation and submission of this brief.

Northwestern University and Harvard Law School, Professor Barnett tried many felony cases as a prosecutor in the Cook County States' Attorney's Office in Chicago. In 2004 he argued *Gonzales v. Raich* in the U.S. Supreme Court. Since entering teaching, he has taught constitutional law, contracts, and criminal law, among other subjects. Prof. Barnett has published more than ninety articles and reviews, as well as eight books. His book, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, 2004), and other scholarship concerns the original meaning of the Commerce and Necessary and Proper Clauses and the relationship of the Necessary and Proper Clause to the other powers enumerated in the Constitution.

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SUMMARY OF ARGUMENT

This case presents the Court with "the arduous . . . task of marking the proper line of partition between the authority of the general and that of the State governments." THE FEDERALIST NO. 37, p. 227 (James Madison) (Clinton Rossiter ed., 1961) ("THE FEDERALIST"). At issue is the constitutionality of 18 U.S.C. § 4248 (the "Act") which imposes on the States and its citizens, a federal system of civil commitment. Congress did not identify the source of its authority to legislate in an area historically reserved to the States and uniquely within their ken. The Government now seeks to uphold the Act as "Necessary and Proper" to Congress' power "to establish a federal penal system."

Pet. Br. at 22, *citing* U.S. CONST. art. I, § 8, cl. 18. Alternatively and implicitly, the Government relies upon the Commerce Clause (U.S. CONST. art. I, § 8, cl. 3), and attempts to distinguish this Court's decisions in *United States v. Lopez,* 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000). *See* Pet. Br. at 42-44. Neither the Necessary and Proper Clause nor the Commerce Clause is a permissible footing for the Act and, therefore, the Act is unconstitutional. As this Court recognized almost 150 years ago, "[n]o graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole," than the Government's unconstitutional assertion of power against its own citizens. *Ex Parte Milligan*, 71 U.S. 1, 118-119 (1866) (granting *habeas corpus* petition).

The Necessary and Proper Clause is not an independent source of Congressional power; rather, it allows Congress to carry out its enumerated powers with "appropriate" means that are "plainly adapted to a [constitutional] end." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). Indeed, *M'Culloch* teaches that the Necessary and Proper Clause provides a basis for searching judicial review of legislative action, and is part of the Constitution's system of checks and balances. By its own terms, the Necessary and Proper Clause permits Congress to enact legislation that "**shall be necessary and proper** ***for carrying into execution***" the powers granted to it in the Constitution.

The Act fails to pass Constitutional muster, first, because it does not even involve a matter within the scope of any enumerated power. Both supporters of the Constitution and its skeptics appropriately feared that Congress would rely upon the Necessary and Proper Clause to enact whatever laws it wanted. The Constitution itself is clear: the Necessary and Proper Clause allows Congress to make laws only "for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States. . . ."

Thus, legislation adopted under the Clause may be justified only by an enumerated power, not by an implied power. Congress may carry into execution the powers specifically delegated to it, and the Necessary and Proper Clause permits adoption of reasonable means to carry into execution the enumerated power. But there the power ends. Indeed, the Tenth Amendment was adopted to ensure that Congress did not rely upon the Clause to expand its powers those enumerated. As it must, this Court has guarded against the danger perceived at the founding of the Republic: **in the 190 years since *M'Culloch*, this Court has never upheld a statute based on the Necessary and Proper Clause that was not tethered to a specific enumerated power**.

The Government reasons that, because Congress has the power to enact criminal laws, it must therefore have the power to establish and maintain a penal system. But the power to operate a penal system is not a constitutional end, and cannot itself imply the further power to provide for civil commitment of persons who would otherwise be released at the ends of their sentences. Thus, the Act cannot rest on the application of the Necessary and Proper Clause to an unenumerated implied power such as the power "to establish a federal penal system."

Nor does the Act "carry into execution" even the Government's implied power "to establish a federal penal system," let alone any enumerated power. Even for matters plainly within the scope of an enumerated power, Congress may not enact laws that do not really further an enumerated end, or that do so at the expense of the rights reserved to the States or the people under the Tenth Amendment. The Court enforced such limits in *Printz v. United States*, 521 U.S. 898 (1997), and should enforce such limits here, too. **The civil commitment of prisoners at the conclusion of their terms has nothing to do with the creation or maintenance of the penal system itself (let alone anything to do with one of Congress' enumerated powers).** Even if Congress had been focused on establishing or maintaining the federal penal system, it would not have done so by passing the Act. The true aim of the Act is not to support the operation of the prison system at all, but to protect the public at large by continuing the confinement of potentially dangerous persons after the conclusion of their sentences. However well intentioned Congress may have been, it had no power to legislate for the purpose of protecting the public from dangerous persons.

The Act cannot be saved through expansion of Congressional authority under the Commerce Clause. The analysis under the Commerce Clause is substantially the same as discussed above. *See* J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. Ill. L. Rev. 581, 622 (2002) ("BECK"). Notably, the Government does not and cannot affirmatively argue that the Act is a legitimate exercise of Congress' Commerce Clause power. **Civil commitment involves neither commerce nor interstate activity**. Mental illness demands physicians not merchants. Instead, the Government merely argues that the Act is not an exercise of the general police power excluded from the Commerce Clause, without showing that the Act is grounded in powers included within the Commerce Clause. Pet. Br. at 42-43.

In the end, Congress cites no constitutional basis for the Act, and the Government's *post hoc* justifications prove only that there is none. The decision of the Fourth Circuit must be affirmed.

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ARGUMENT

I. The Constitution Creates a Federal Government of Limited Enumerated Powers and Every Act of Congress Must Have a Constitutional Source.

The federal government exists, intentionally so, as a government of limited powers:

> We start with first principles. The Constitution creates a Federal Government of enumerated powers. As James Madison wrote, the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. This constitutionally mandated division of authority was adopted by the Framers to ensure protection of our fundamental liberties. Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

United States v. Lopez, 514 U.S. 549, 552 (1995) (citations and quotations omitted); *M'Culloch*, 17 U.S. at 405 ("Th[e] [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted."). After all, when the Constitution was drafted, our nascent Nation had just declared independence from the Super-Power of its day because "[t]he history of the present King of Great Britain is a history of repeated injuries and usurpations, all having, in direct object, the establishment of an absolute tyranny over these states." THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

In response to this "long train of abuses and usurpations," our forefathers found it their "duty" not only "to throw off such government," but also "to provide new guards for their security." *Id.* The Constitution was that safeguard. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.").

History taught our Nation's founders that such safeguards were absolutely necessary to maintain our liberties:

> Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; . . . . [O]ur fathers . . . knew the history of the world told them . . . that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. . . . [T]hey secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb. . . .

Ex Parte Milligan, 71 U.S. at 124.

To ensure that these fundamental limits are applied, "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *Morrison*, 529 U.S. at 607. Article I begins: "All legislative powers *herein granted* shall be vested in a Congress of the United States. . . ." U.S. CONST. art. I, § 1 (emphasis added). In this case, however, "Congress did not explicitly identify the source of federal authority on which it relied in enacting the civil commitment provision of the . . . Act." *United States v. Comstock*, 507 F. Supp. 2d 522, 530 (E.D.N.C. 2007). For the reasons discussed below, neither the Necessary and Proper Clause, nor the Commerce Clause can provide Congress with the authority for the Act.

II. The Act Is Not a Legitimate Exercise of The Necessary and Proper Clause.

A. The Necessary and Proper Clause Limits Congressional Power.

The Necessary and Proper Clause provides:

> The Congress shall have the Power . . . [t]o make all Laws which [1] **shall be** [2] **necessary and** [3] **proper** [4] **for carrying into Execution** [5] the foregoing Powers and all other **Powers vested by this Constitution** in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. art. I, § 8, cl. 18 (the "Clause") (emphasis added). In order to guard against another tyranny, the text of the Clause limits Congressional Power in five ways:

(1) it permits judicial review by stating that the requirements and limits specified by the Clause "shall be"

(2) it requires that laws be "necessary"

(3) it requires that laws be "proper"

(4) it permits only those laws that actually carry into execution those powers within its scope; and

(5) it defines the limited scope of the Clause, which applies only to "Powers vested by the Constitution."

While we initially discuss all five limitations in order to understand the role of the Necessary and Proper Clause as a check on Congressional power, this brief primarily focuses on the fourth and fifth limitations in Sections II(C)(2) and II(C)(1), respectively.

Shall Be

Chief Justice Marshall explained that the Clause creates a basis for judicial review to circumscribe congressional action:

> Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; **it would become the painful duty of this tribunal**, should a case requiring such a decision

> come before it, **to say, that such an act was not the law of the land**.

M'Culloch, 17 U.S. at 423. The requirement that the laws "shall be necessary and proper," does not permit Congress to decide for itself what is necessary and what is proper. *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L. J. 267, 276 (1993) ("LAWSON"), *cited in Printz*, 521 U.S. at 924. Instead, the Necessary and Proper Clause provides a basis for judicial review. *See* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 208-215 (2003) ("BARNETT").

The frequently quoted test for such review is: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are **appropriate**, which are **plainly adapted to that end**, which are not prohibited, but **consist with the letter and spirit of the constitution**, are constitutional." *M'Culloch*, 17 U.S. at 421 (emphasis added).

When required, this Court has in fact relied upon the Necessary and Proper Clause to determine that a Congressional act "was not the law of the land." *See Printz*, 521 U.S. at 923-24 (Brady Act was not Necessary or Proper because it violated state sovereignty in the execution of the Commerce Clause).

In exercising that judicial review, this Court must effectuate the twin requirements that legislation be both necessary and proper. *See* BARNETT at

215-220; LAWSON at 307-08, *citing* Andrew Jackson, *Veto Message*, *reprinted in* 3 THE FOUNDERS' CONSTITUTION 263 (Philip B. Kurland & Ralph Lerner eds., 1987) ("This privilege . . . is not '*necessary*' to enable the bank to perform its public duties, nor in any sense '*proper*,' because it is vitally subversive of the rights of the States.").

Necessary

While "necessary" does not mean "absolutely necessary," it certainly has limits. BARNETT at 203-215. This Court asks whether legislation was really enacted to further the end on which its constitutionality was purportedly based. BECK at 609. "The legislature must utilize means 'really calculated to' effect an end entrusted to its care, and may not use its constitutional powers as a 'pretext' for achieving other ends." BECK at 612, *citing M'Culloch*, 17 U.S. at 423. "The longer the chain of cause and effect between the means and the professed end, the less plausible is the claim that the measure will really perform the function asserted." BECK at 613.

Proper

In addition to being necessary, laws must also be proper. Proper regulation limits the scope of regulation. *See Comstock*, 507 F. Supp. 2d at 540-41, *citing M'Culloch*, 17 U.S. at 423 and *Morrison*, 529 U.S. at 618 n.8. *Accord* LAWSON at 271 ("[T]he word 'proper' serves a critical . . . constitutional purpose by requiring executory laws to be *peculiarly within Congress's domain or jurisdiction* – that it, by requiring that such laws not usurp or expand the constitutional powers of any federal institutions or infringe upon the retained rights of the state or of individuals.") (italics in original).

For Carrying into Execution

The Necessary and Proper Clause may only be used to carry into effect certain powers: "It is never the end for which other powers are exercised, but a means by which other objects are accomplished." *M'Culloch*, 17 U.S. at 411.

Powers Vested by this Constitution

The plain language of the Clause applies by its own terms first, to "the foregoing powers," and second to "all other Powers vested by this Constitution." The "foregoing powers" apply to those in Article I, § 8, cls. 1-17. The "other Powers vested by this Constitution" must be found within the Constitution itself because "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST., amend. X.

Notwithstanding the text of the Clause, during the ratification debate, the "Antifederalists" expressed concern about a broad reading of it (like that advanced by the Government today):

> To the argument that no Bill of Rights was necessary because the Constitution was one of enumerated powers, . . . the Antifederalists . . . pointed out the implications of the "necessary and proper" clause in combination with these broadly defined powers. If Congress had the power to make war, and decided that curtailment of freedom of the press was necessary and proper to this end, what was to prevent Congress from passing a law to this effect?

The Antifederalists, Edited by Cecelia M. Kenyon, lxx (1985 Ed.).

For example, the thirteenth letter of "Agrippa," dated Jan. 14, 1788, argued that, based on the Necessary and Proper Clause, "By sect. 8 of article 1, Congress are to have the unlimited right to regulate commerce, external and *internal*, and . . . They have indeed very nearly the same powers claimed formerly by the British parliament." Antifederalists at 142-43; *accord* BECK at 588 ("George Mason's widely circulated critique of the Constitution objected to [the Clause] in the following terms: 'Under the own Construction of the general Clause at the End of the enumerated Powers, the Congress may . . . extend their Powers as far as they think proper; so that the State Legislatures have no Security for the Powers they presumed to remain to them; or the People for their Rights."), *citing* 13 THE DOCUMENTARY HISTORY

OF THE RATIFICATION OF THE CONSTITUTION 350 (1983). Based upon this fear, the Antifederalists argued for adoption of the Bill of Rights, including the Tenth Amendment, to clearly and unambiguously limit Congressional power.

Addressing these concerns, Alexander Hamilton explained that the Necessary and Proper Clause **did not** expand Congress' power beyond those enumerated in Article I, § 8. Hamilton asked rhetorically: "What are the proper means of executing such a power but *necessary* and *proper* laws?" THE FEDERALIST NO. 33, p. 202. James Madison argued that the Clause was redundant because, even without it, Congress would enjoy the same powers by "unavoidable implication." THE FEDERALIST NO. 44, p. 285.

Thus, Hamilton reasoned that any reasonable fears of federal power could stem only from Congress' express powers: "If there be anything exceptionable, it must be sought for in the specific powers upon which this general declaration [the Clause] is predicated. The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless." THE FEDERALIST NO. 33, p. 203.

Hamilton further contended that the Bill of Rights was not only unnecessary, but a dangerous implication of powers that the Constitution was intended to deny to the federal government:

> I go further and affirm that bill of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in

> the proposed Constitution, but they would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?

THE FEDERALIST NO. 84, p. 513.

While the Federalists and Antifederalists disagreed as to how to limit the powers of Congress, they both agreed that such limitations were necessary to preserve our freedoms.

The meaning of the Necessary and Proper Clause was hotly debated in the first Congress in connection chartering a national bank. *See* BARNETT at 188. Madison delivered the following speech from the floor of Congress on February 2, 1791:

> Whatever meaning this clause may have, none can be admitted, that would give unlimited discretion to Congress.
>
> Its meaning must, according to the natural and obvious force of the terms and the context, be limited to means necessary to the end, and incident to the nature of the specified powers.
>
> The clause is in fact merely declaratory of what would have resulted by unavoidable implication, as the appropriate, and, as it were, technical means of executing those powers. In the sense it has been explained by

> the friends of the Constitution, and ratified by the State Conventions.
>
> **The essential characteristic of the Government, as composed of limited and enumerated powers, would be destroyed**, if instead of direct and incidental means, any means could be used which, in the language of the preamble to the bill, "might be conceived to be conducive to the successful conducting of the finances, or might be conceived to tend to give facility to the obtaining of loans."
>
> * * *
>
> Mark the reasoning on which the validity of the bill depends. To borrow money is made the end, and the accumulation of capitals implied as the means. The accumulation of capitals is then the end, and a Bank implied as the means. The Bank is then the end, and a charter of incorporation, a monopoly, capital punishment, etc. implied as the means.
>
> **If implications, thus remote and thus multiplied, can be linked together a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.**

BARNETT at 190-91, quoting 1 ANNALS OF CONG. 1947-49 (Joseph Gales ed., 1791) (emphasis added).

As President, Thomas Jefferson ridiculed the chain of inferences offered to sustain expansion of Congress' powers:

> Congress are authorized to defend the nation. Ships are necessary for defense; copper is necessary for ships; mines are necessary for copper; a company is necessary to work mines; and who can doubt this reasoning who has ever played at "This is the House that Jack Built?" Under such a process of filiation of necessities the sweeping clause makes clean work.

BARNETT at 191 n.50 (citation omitted). The Government's arguments here resonate with what Jefferson disparaged as a "filiation of necessities."

The Role of the Necessary and Proper Clause

The Necessary and Proper Clause is an integral part of the structure of the Constitution. Like other structural constraints, the jurisdictional boundaries affirmed by its text serves a vital role in preserving the checks and balances that restrain the federal government which, otherwise, would go unchecked:

> A jurisdictional understanding of the [Clause] illuminates the meanings of the Ninth and Tenth Amendments and clarifies the Constitution's methods for safeguarding federalism and the separation of powers. . . . The principal function of the Ninth Amendment is . . . to prevent misconstruction of the [Clause]. . . . The Ninth Amendment does not add new

> constraints to Congress's power, but it preserves those constraints that the [Clause] had already built into the Constitution. . . . [T]he Tenth Amendment . . . expressly confines the national government to its delegated sphere of jurisdiction. . . . The Tenth Amendment, as with the rest of the Bill of Rights, is this declaratory of principles already contained in the unamended Constitution via the [Clause].

LAWSON at 326-30.

B. The Necessary and Proper Clause, By Itself, Creates No Constitutional Power and, Therefore, the Act Cannot Be Based Solely on the Necessary and Proper Clause.

As a consequence of its own textual limitations, the Necessary and Proper Clause "by itself, creates *no* constitutional power." *United States v. Comstock*, 551 F.3d 274, 278 (4th Cir. 2009) (italics in original); *accord Kinsella v. Singleton*, 361 U.S. 234, 247-48 (1960) (same).

Scholars have held this view for more than two hundred years. *See* BARNETT at 212-13, *citing* St. George Tucker, Appendix, *in* 1 WILLIAM BLACKSTONE, COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 287 (1803) ("The plain import of the clause is, that congress shall have all the incidental or instrumental powers, necessary and proper for the carrying into execution all the express powers; . . . It neither enlarges any power specifically granted, nor is it a grant of new powers to congress, but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those otherwise granted, are included in the grant."); *accord* LAWSON at 275 (with citations).

Because the Necessary and Proper Clause is not an independent source of Congressional power, it cannot on its own support the Act.

C. The Necessary and Proper Clause Must Carry into Execution an Enumerated Power and, Therefore, the Act Cannot Be Predicated on Congress' Implied Power to Establish a Federal Penal System.

The Necessary and Proper Clause permits Congress to enact laws "for carrying into Execution" the enumerated powers. *Comstock*, 551 F.3d at 279 ("[T]o sustain [the Act] under the Necessary and Proper Clause, the Government must show that the statute is necessary to achieve ends within Congress's *enumerated* powers.") (italics in original), *citing Sabri v. United States*, 541 U.S. 600, 605 (2004). The Government's argument – that the Clause by itself authorizes legislation on a subject outside the scope of enumerated powers – consistently has been rejected since the founding of the Republic.

1. This Court has never upheld legislation under the Necessary and Proper Clause that did not carry into execution an enumerated power.

The Government contends that the Act is justified by "Congress's Undisputed Authority to Establish A Federal Penal System." Pet. Br. at 22. However, the authority to establish a federal penal system is not an enumerated power; instead, it is implied from Congress' express power to punish certain crimes.

In each of the cases cited by the Government on this issue (Pet. Br. 22-23), the Necessary and Proper clause was, in fact, predicated on an enumerated power. *See Sabri*, 541 U.S. at 605 (statute proscribing bribery of state, local and tribal officials of entities receiving at least $10,000 in federal funds, was justified by the spending clause in Art. I, § 8, cl. 1); *Jinks v. Richland County*, 538 U.S. 456, 462 (2003) (tolling incident to supplemental jurisdiction statute necessary and proper for carrying into execution, *inter alia*, Congress' power to "constitute Tribunals inferior to the supreme Court"); *Burroughs v. United States*, 290 U.S. 534, 544 (1934) (Federal Corrupt Practices Act of 1925 enacted "to preserve the purity of presidential and vice presidential elections" set out in Art. II, § 1); *M'Culloch*, 17 U.S. at 407 (Congress' power to incorporate a bank based upon "the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies").

The other cases cited by the Government that analyze the Necessary and Proper Clause likewise involved enumerated powers. *See Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (Controlled Substances Act was "well within its authority to make all Laws which shall be necessary and proper to regulate Commerce among the several States.") (internal quotations and ellipses omitted); *Morrison*, *supra* (Government invoked Commerce Clause to justify the Civil Remedies for Violence Against Women Act); *Lopez*, *supra* (Government invoked Commerce Clause to justify the Gun-Free School Zone Act of 1990); *Greenwood v. United States*, 350 U.S. 366, 369, 375 (1956) (civil commitment of the insane is necessary and proper to the "unexhausted" power to prosecute the robbery of a U.S. Post Office and an assault of a postal employee[2]).

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[2] *See* U.S. CONST. art. I, § 8, cl. 7. As Chief Justice Marshall explained, the power to establish post-offices includes the power to punish the crimes "stealing or falsifying a record or process of a court of the United States, or . . . perjury in such Court." *M'Culloch*, 17 U.S. at 417; BECK at 606. Alternatively, *Greenwood* could have been based upon Congress' power "[t]o constitute tribunals inferior to the supreme Court." U.S. CONST. art. I, § 8, cl. 9. Indeed, in *Greenwood*, the Court could not carry out its own powers to prosecute the defendant without committing him civilly because he was incompetent to stand trial for the crimes committed. The act under review had been the subject of a "long study" by the Judicial Conference of the United States (*Greenwood*, 350 U.S. at 373), suggesting that the federal courts determined that Congress' act was needed to carry out the judicial function. Even then, the Court carefully noted "[w]e reach the narrow constitutional issue raised by the order of commitment in the circumstances of this case." *Id.* at 375. The Court

(Continued on following page)

Moreover, since *M'Culloch*, this Court has affirmatively required that laws adopted under the Necessary and Proper Clause be predicated upon an enumerated power. *See United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) ("The commerce power . . . extends to those activities which so affect interstate commerce, or the assertion of the power of Congress over it, as to make the regulation of the appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce."); *United States v. Darby*, 312 U.S. 100, 121 (1941) (upholding portions of FLSA under commerce clause, noting that legislation is sustained "when the means chosen, although not themselves within the granted power, [are] nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government"); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 393 (1940) ("Congress may impose penalties in aid of the exercise of any of its enumerated powers."); *Everard's Breweries v. Day*, 265 U.S. 545, 560 (1924) (power to regulate intoxicating liquors for medicinal purposes is necessary and proper under the Eighteenth Amendment); *Battle v. United States*, 209 U.S. 36, 37-38 (1908) (criminal

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reiterated: "We decide no more than the situation before us presents and equally do not imply an opinion on situations not before us." *Id.* at 376. Understandably, the Government does not offer *Greenwood* as support for its position that the Necessary and Proper Clause may carry into effect unenumerated powers. *See* Pet. Br. at 22-23.

statute punishing murder on federal enclave was based on Congress' plenary power over federal enclaves); *California v. Pacific R.R. Co.*, 127 U.S. 1, 39 (1888) (power to construct highways and bridges is incident to commerce power); *United States v. Fox*, 95 U.S. 670, 672 (1877) (Congress cannot penalize state fraud committed pre-bankruptcy despite its power under Article I, § 8, cl. 4 "to establish uniform laws on the subject of bankruptcies throughout the United States."); *Kohl v. United States*, 91 U.S. 367, 372 (1875) (power of eminent domain to acquire property to establish courts and post offices is necessary and proper to enumerated powers).[3]

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[3] In *Jacob Ruppert, Inc. v. Caffey*, 251 U.S. 264, 300 (1920), in response to the argument that the Necessary and Proper Clause cannot be based upon an implied power, this Court held that, because the power to prohibit intoxicating liquors and non-intoxicating liquors was a "single broad power," it was not sanctioning the application of an implied power to an implied power. *Id.* at 299. In particular, because Congress could exercise its war power (U.S. CONST. art. I, § 8, cl. 11) to preserve the use of grains, cereals, and fruit for the war effort, that enumerated power was broad enough to prohibit the manufacture and sale of intoxicating liquors through the War-Time Prohibition Act, and the same "broad power" could also regulate non-intoxicating liquors (*i.e.*, "near beer"). Nonetheless, the Court, in *dicta*, disparaged the argument presented here (*id.* at 300), relying on *Battle*, *Pacific Railroad* and *Kohl*, none of which supported the *dicta*. The dissenting justices rejected this *dicta*, echoing Madison's slippery slope argument:

> The argument runs . . . that under a power implied because necessary and proper to carry into execution the above named powers relating to war, . . . Congress could prohibit the sale of intoxicating liquors. In order

(Continued on following page)

The Government provides no support for its contention that the Necessary and Proper Clause may "carry[ ] into execution" the power "to establish a federal penal system."

2. The Act does not carry into execution any Congressional power, let alone an enumerated power.

"[T]he government acknowledged that the power to legislate provided by the Necessary and Proper Clause must be rooted in an enumerated power in Article I or some other Article of the Constitution." *United States v. Wilkinson*, 626 F. Supp. 2d 184, 187 (D. Mass. 2009) (dismissing civil commitment proceedings under the Act as unconstitutional). Yet, the Government has been unable to establish, or even hint, that the Act was necessary or proper (and it must prove both) for carrying into execution one of the enumerated powers.

In the district court, the Government relied solely on the Necessary and Proper Clause standing alone.

> to make such a prohibition effective the sale of non-intoxicating beer must be forbidden. Wherefore, from the implied power to prohibit intoxicants the further power to prohibit this non-intoxicant must be implied. The query at once arises: If all this be true, why may not the second implied power engender a third under which Congress may forbid the planting of barley or hops, the manufacture of bottles or kegs, etc., etc.?

Ruppert, 251 U.S. at 305-08 (McReynolds, J., dissenting).

Comstock, 507 F. Supp. 2d at 530. On appeal, the Government based its argument chiefly on the Necessary and Proper Clause, and briefly the Commerce Clause. *Comstock*, 551 F.3d at 278-79. In its petition for certiorari, the Government argued that the Act was "a rational incident to the government's undisputed authority under Congress's Article I powers to enact criminal laws, provide for the operation of a penal system, and assume for the United States custodial responsibility for its prisoners." Cert. Pet. at 18.

In its brief on the merits, the Government is still searching for some constitutional power with which to justify the Act. Yet, the only constitutional or statutory provision it cites is the Necessary and Proper Clause itself. *See* Pet. Br. at 1-2. The Government contends that the Act is justified by "Congress's Undisputed Authority to Establish A Federal Penal System." Pet. Br. at 22. Recognizing that the power to establish a federal penal system is not, itself, an enumerated power, the Government points to the following clauses of U.S. CONST. art. I, § 8, as the sources for "powers to enact criminal laws, provide for the operation of a penal system, and assume for the United States custodial responsibilities for its prisoners":

- Cl. 1 (to lay and collect taxes)
- Cl. 3 (to regulate interstate commerce)
- Cl. 7 (to establish post offices)
- Cl. 14 (to regulate the armed forces); and

- Cl. 17 (to exercise jurisdiction over the District of Columbia, federal territories and federal enclaves)

Pet. Br. at 23. Although the Government ties the enactment of **other** "criminal statutes prohibiting and punishing certain conduct," (Pet. Br. at 23), to these enumerated powers, it makes no effort to tie **this Act** to **those powers**. Nor could it.

The Act has nothing to do with taxation, post-offices, or the armed forces. Nor does the Act have anything to do with the District of Columbia or any federal territory or federal enclave. This leaves only the Commerce Clause. But the Act neither involves interstate commerce, nor any other activity that is essential to a broader scheme by which interstate commerce is regulated.

Even assuming *arguendo* that the "power to establish a federal penal system" were a proper object of the Necessary and Proper Clause, the Government still fails to articulate how the Act carries out even that implied power. The question is not whether the Act somehow relates to a Congressional power, but whether the Act is necessary and proper to carry into execution that power. *M'Culloch*, 17 U.S. at 411 ("It is never the end for which other powers are exercised, but a means by which other objects are accomplished."). The Act does not carry into execution the power to establish a penal system. Even under Hamilton's broadest notion of "necessary," locking up persons indefinitely is not "conducive" or "convenient" to the establishment of a prison. The implied power to build a prison to effectuate its enumerated powers does not give Congress the ability to invent new ways to ensure its occupancy.

In the end, the paucity of the Government's justification for this exercise of power leads to the inescapable conclusion that "under the pretext of executing its powers," the Congress has enacted a law "for the accomplishment of objects not intrusted to the [federal] government," and, for this reason, it is "the painful duty of this tribunal, . . . to say, that such an act [is] not the law of the land." *M'Culloch*, 17 U.S. at 423.

III. The Act Does Not Fall Within Congress' Authority Under the Commerce Clause.

The Commerce Clause empowers Congress "[t]o regulate Commerce with foreign Nations, and among the Several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

"Commerce," of course, involves economic activity. *Mobile v. Kimball*, 102 U.S. 691, 702 (1880) ("Commerce with foreign countries, and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities."); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-190 (1824) ("Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."). But, not all economic activity has been perceived to be commerce. *See Kidd v. Pearson*, 128 U.S. 1, 20-21 (1888) (Iowa statute prohibiting alcohol did not violate commerce clause, drawing a distinction "between manufactures and commerce").

The Court has long expressed the need to guard the borders of Congressional power. In *NLRB v. Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U.S. 1, 37 (1937). Similarly, in *Maryland v. Wirtz*, the Court reaffirmed that "the power to regulate commerce, though broad indeed, has limits" that "[t]he Court has ample power" to enforce. 392 U.S. 183, 196 (1968), *overruled on other grounds*, *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

The authority to regulate intrastate matters affecting interstate commerce rests, not on the Commerce Clause, but on the Necessary and Proper Clause, where such regulation is necessary and proper to carry into effect Congress' power to regulate interstate commerce. *See Darby*, 312 U.S. at 118:

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. *See McCulloch v. Maryland*. . . .

See also Raich, 545 U.S. at 34 (Scalia, J., concurring in the judgment) ("Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause."). Taken together, these cases recognize that Congress can regulate intrastate activity where such regulation is connected and appropriate to Congress' power to regulate the interstate market.

Effectuating the language of the Necessary and Proper Clause, the Supreme Court has insisted that Congress may enact laws necessary (*i.e.*, "plainly adapted") to its power under the Commerce Clause (*i.e.*, tethered to an enumerated power, so long as it is not "a pretext"), and proper (*i.e.*, not a violation of the rights of the States or the people, and consistent "with the letter and spirit of the constitution"). Thus, in *Gibbons*, Congress could reach intrastate monopolies that impeded Congress' regulation of Commerce between the States. In *Darby*, Congress could reach wages paid for intrastate manufacture of lumber that impeded Congress' power to control interstate competition. In *Wrightwood*, Congress could reach the intrastate sale of milk to effectuate its regulation of the interstate milk market. In *Wickard v. Filburn*, 317 U.S. 111 (1942), Congress could reach intrastate wheat consumption to effectuate its regulation of the nationwide wheat market. And, in *Raich*, Congress could reach locally grown marijuana to effectuate its regulation of the nationwide drug market. In each case, Congress was faced with issues involving nationwide markets, and those challenging the regulation contended that the otherwise enforceable regulation could not reach them because their activities were wholly intrastate. This Court, however, sanctioned Congress' exercise of power because the intrastate regulation was necessary (*i.e.*, plainly adapted) to Congress' exercise of its power over interstate commerce and was proper (*i.e.*, not an undue intrusion upon areas of regulation traditionally reserved to the states).

In contrast, in *Lopez*, the Court noted that the statute at issue, which reached non-economic activity, "is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." 514 U.S. at 561.[4] In *Morrison*, the Court rejected the argument that the aggregate economic effect on interstate commerce of non-economic conduct is sufficient to justify Congress to regulate the non-economic conduct. 529 U.S. at 617-618 ("We accordingly reject the argument that Congress may regulate non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local."). Indeed, the Act is further removed from economic activity than the statute in *Morrison*. If gender-motivated crimes are not economic activity, then certainly dangerous thoughts are not economic activity.

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[4] To date, the Court has yet to uphold a Commerce Clause regulation of any intrastate activity that is not itself economic in nature. *See Morrison*, 529 U.S. at 613 ("thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."). The majority in *Raich* found, rightly or not, that the cultivation of marijuana for home consumption was an economic activity akin to the economic activity in *Wickard*. *See Raich*, 545 U.S. at 18 ("Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market."), *cited in* Randy E. Barnett, *Foreword: Limiting Raich*, 9 LEWIS & CLARK L. REV. 743, 747 n.17 (2005). This Court should correct any misconception that *Raich* extended the Commerce Power to reach non-economic intrastate activity and, to the extent that *Raich* did extend the Commerce Power, that decision should be overruled.

In his concurring opinion in *Raich*, Justice Scalia did not contend that Congress had the power under the Commerce Clause to regulate non-economic activity. Instead, he justified the prohibition on intrastate non-economic activity under the Necessary and Proper Clause as an "essential" means for the regulation of interstate commerce:

> Unlike the power to regulate activities that have a substantial effect on interstate commerce, the power to enact laws enabling **effective regulation of interstate commerce** can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures **necessary to make the interstate regulation effective**. As *Lopez* itself states, and as the Court affirms today, Congress may regulate noneconomic intrastate activities only where the failure to do so "could . . . undercut" its **regulation of interstate commerce**. This is not a power that threatens to obliterate the line between "what is truly national and what is truly local."

Raich, 545 U.S. at 38 (Scalia, J., concurring) (emphases added). These conclusions are all inescapable because legislation under the Necessary and Proper Clause must, by definition, carry into effect one of

Congress' enumerated powers, in this case the Commerce Clause.[5]

Indeed, "[t]he Court could have explained this economic conduct limitation [in *Lopez* and *Morrison*] as an interpretation of the Necessary and Proper Clause designed to prevent Congress from employing means remote from its power to regulate interstate commerce." BECK at 622. After all, "a legislator truly interested in the control or promotion of interstate commerce would be unlikely to regulate school-zone gun possession or gender-motivated violence as means to that end. Precisely because the activities bear only remotely on the interstate market, it is implausible that Congress regulated them *because of* their effect on commerce." BECK at 624 (italics in original). "While one can sketch such a connection through a lengthy chain of cause and effect relationships, the connection is so remote and attenuated that one cannot say these statutes are 'plainly adapted' to the achievement of any end delegated to Congress by the Commerce Clause. . . . [The] *Lopez/Morrison* rule appears to implement, in a rough (but judicially manageable fashion) the . . . principles from *McCulloch*." BECK at 625.

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[5] The problem with this analysis was not its substance but the deference afforded to Congress' assessment that the regulation of non-economic interstate activity was "essential" to the broader regulatory scheme. *See Raich*, 545 U.S. at 37 ("The relevant question is simply whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power."). Significantly, Chief Justice Rehnquist, who penned the "broader regulatory scheme" doctrine in *Lopez*, dissented in *Raich*.

Here, the Act does not involve the regulation of commerce in any fashion. Nor does the Act reach intrastate economic activity that substantially affects Congress' power to regulate interstate commerce. Instead, Congress seeks to authorize the civil commitment of persons deemed to be "sexually dangerous," a subject matter not even remotely economic in nature. Finally, the Act cannot be justified as an "essential" means of carrying into execution a broader regulation of interstate commerce. Therefore, it is unconstitutional.

CONCLUSION

The decision of the Fourth Circuit should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

UNITED STATES,
Petitioner,

v.

GRAYDON EARL COMSTOCK, JR., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE STATES OF KANSAS, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Congress has the constitutional authority to enact 18 U.S.C. § 4248, which authorizes court-ordered civil commitment by the federal government of (1) "sexually dangerous" persons who are already in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences, and (2) "sexually dangerous" persons who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial.

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INTEREST OF THE *AMICI* STATES

The States have been the leader in the area of sex offender civil commitment programs, having established and defended the modern programs beginning in the early 1990s. Civil commitment of sex offenders is not a new or novel approach to providing long-term care and treatment to those suffering from mental abnormalities that make them dangerous, as well as protecting society from such individuals. In the 1930s, "sexual psychopath" laws were enacted to rehabilitate sex offenders. By the 1960s, more than half the States had such laws. Nathan James, et al., *Civil Commitment of Sexually Dangerous Persons* 5 (2008); *see also Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940) (rejecting due process and equal protection challenges to one such "sexual psychopath" law allowing for civil commitment).

In 1990, Washington became the first state to enact a second generation of sex offender civil commitment laws, sometimes referred to as "sexually violent predator acts." Wash. Rev. Code Ann. § 71.09.01 *et seq*. Kansas and other states soon followed suit. At least 21 states now have such programs. *See* Ariz. Rev. Stat. Ann. § 36-3701 *et seq*.; Cal. Welf. & Inst. Code § 6600 *et seq*.; Fla. Stat. Ann. § 394.910 *et seq*.; Ill. Comp. Stat. Ann. ch. 725, §205 *et seq*.; Iowa Code Ann. § 229A; Kan. Stat. Ann. § 59-29a01 *et seq*.; Mass. Gen. Laws Ann. ch. 123A; Minn. Stat. Ann. § 253B; Mo. Ann. Stat. § 632.480 *et seq*.; Neb. Rev. Stat. Ann. § 29-2923 *et seq*.; N.H. Rev. Stat. Ann. § 135-E:1 *et seq*.; N.J. Stat. Ann. § 30:4-82.4 *et seq*.; N.M. Stat. Ann. § 43-1-1 *et seq*.; N.Y. Mental Hyg. Law § 10.01 *et seq*.; N.D. Cent. Code § 25-03.3-01 *et seq*.; Or. Rev. Stat. Ann. § 426.510 *et seq*.; S.C. Code Ann. § 44-48-10 *et* *seq*.; Tenn. Code Ann. § 33-6-301 *et seq*.; Tex. Health & Safety Code Ann. § 841.001 *et seq*.; Wis. Stat. Ann. § 980.01 *et seq*.

As of December 2004, almost 3,500 individuals had been committed in these state programs, at an annual nationwide cost of approximately $224 million. Washington State Institute for Public Policy, *Involuntary Commitment of Sexually Violent Predators: Comparing State Laws* 1 (2005). That works out to an average nationwide cost of $64,000 per year per committed individual (in 2004 dollars). Indeed, sex offender civil commitment programs are expensive to operate for several reasons. For one, they must be conducted in a secure facility given the reasons the offenders are receiving treatment. For another, the treatment provided to such individuals is long-term and behavioral or cognitive in nature; these individuals generally cannot be treated simply with a drug or prescription. Certainly, the sex offender civil commitment programs are much more expensive in general than operating a prison. That 21 states have nonetheless adopted such programs demonstrates the importance of state (and now federal) efforts to treat and rehabilitate such individuals prior to their release into society at large.

The first constitutional case involving these laws to reach the Court was *Kansas v. Hendricks*, 521 U.S. 346 (1997). In *Hendricks*, the Court upheld the Kansas statute against substantive due process, double jeopardy, and *ex post facto* challenges, recognizing that "States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health." *Id.* at 371. A few years later, when addressing the Washington program, the Court again emphasized that states have "an interest in protecting the public from dangerous individuals with treatable as well as untreatable conditions." *Seling v. Young*, 531 U.S. 250, 262 (2001).[1]

Though the States do have a general interest in the proper interpretation of the Commerce Clause and the Necessary and Proper Clause, particularly because Congress may rely on those clauses to adopt legislation purporting to preempt state laws, *e.g.*, *Gonzales v. Raich*, 545 U.S. 1 (2005), the States' interest in this case is unrelated to preemption considerations. Rather, the federal program at issue here (for prisoners about to be released from federal custody) is best viewed as *complementary* to state efforts in this area; the federal program in no way intrudes upon state prerogatives or interests.[2] Indeed, the operation of a federal sex offender civil commitment program may well contribute to the "laboratory of ideas", a concept the Court frequently has recognized as one of the important benefits of federalism.

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[1] The Court has decided one other case involving a state sex offender civil commitment law. *See Kansas v. Crane*, 534 U.S. 407 (2002).

[2] The States do not address the second aspect of the Question Presented, regarding Congress' authority to civilly commit sexually dangerous persons who have been found mentally incompetent to stand trial, though the Court's decision in *Greenwood v. United States*, 350 U.S. 366 (1956), appears to resolve that question in Congress' favor.

The federal program also serves the same purpose as the state sex offender civil commitment laws, namely treating dangerous sex offenders with mental abnormalities until it is safe to release them into the general public. Because of both the nature of the treatment required and the particular security concerns involved, these programs are expensive to operate. Until the federal program was enacted, the States were shouldering this burden alone.

The federal program makes an important contribution by treating at least some of the persons in federal custody who are dangerous and mentally abnormal sex offenders. Although federal law expressly permits—even encourages—the transfer of federal inmates to state custody for sex offender treatment if the States are willing to accept such persons, the States generally could not and would not want to absorb federal offenders into the existing state programs for a variety of reasons. Thus, the States and the federal government share a strong interest in seeing complementary and effective federal and state programs operate.

SUMMARY OF THE ARGUMENT

The federal sex offender civil commitment program established pursuant to 18 U.S.C. § 4248 does not in any way intrude upon traditional state police powers. Nor does the federal program in any way impede or disrupt state sex offender civil commitment programs. To the contrary, the federal government's efforts complement and further the purposes of the States' programs for dealing with sexually dangerous offenders. Indeed, the federal law preserves and promotes federalism (1) by expressly allowing states to take custody of sex predators upon their release from federal custody if the states so desire (though states are never required to do so), and (2) by providing grants to assist states in creating and enhancing their own sex offender civil commitment programs. Simply put, § 4248 is a model of cooperative state and federal efforts; the statute neither imposes a federal mandate on unwilling states nor does it preempt any of the States' traditional police powers.

Section 4248 can be sustained as an exercise of Congress' enumerated powers over interstate commerce and federal territories. There is no dispute that federal laws prohibiting the possession and distribution of child pornography or making sexual abuse a crime when it occurs in federal territories, for example, are legitimate exercises of Congress' enumerated powers. If Congress has enumerated powers to criminalize such conduct, it necessarily has the power to imprison, commit, treat and attempt to rehabilitate those who commit such offenses. Moreover, there is a legitimate federal interest in not releasing dangerous and mentally abnormal sex offenders in federal custody into society without care and treatment, irrespective of what federal offenses brought those persons into federal custody. The ease with which modern day sex offenders can utilize the internet and interstate travel to commit sexually violent offenses further demonstrates that Congress has enumerated powers that support the enactment of 18 U.S.C. § 4248.

At a minimum, the Necessary and Proper Clause provides a constitutional basis for the enactment of § 4248. Under that Clause, the test is simply whether a congressional enactment is a rational and appropriate means for effectuating an enumerated power. Section 4248 satisfies that test because the nexus between sex offender civil commitment and the enforcement of numerous federal laws prohibiting a variety of sexual misconduct is clear. Civil commitment of sexually dangerous federal prisoners will prevent the commission of future federal crimes by these same offenders. The connection between federal sex offender civil commitment and federal interests is more than rational here; it is quite direct and strong.

Finally, the rationale and the result in *Greenwood v. United States*, 350 U.S. 366 (1956), demonstrate that Congress has the constitutional authority to enact § 4248. Because § 4248, like the federal law at issue in *Greenwood*, authorizes the civil commitment of persons properly in federal custody who suffer from mental abnormalities making them dangerous to others and to federal interests, the reasoning of *Greenwood* controls here. In fact, the federal government's lawful claim over the person to be civilly committed is even stronger under § 4248 than it was in *Greenwood*, where the mentally incompetent person had only been charged with federal offenses, but had not been tried, convicted and sentenced. At a minimum, it is necessary and proper that the federal government be able to civilly commit dangerous, mentally abnormal persons lawfully in federal custody, as the Court's decision in *Greenwood* certainly implies.

ARGUMENT

I. SECTION 4248 RESPECTS FEDERALISM.

Importantly, from the States' perspective, the federal program at issue in this case in no way intrudes on traditional state police power prerogatives. To the contrary, the States view the federal program as complementing and expanding the States' efforts to treat mentally abnormal and dangerous offenders while also protecting the public.

In no respect does the federal program intrude on the States traditional police powers. Nothing in § 4248 prevents a state from adopting and implementing its own civil commitment program for sexually dangerous individuals. Further, if for some reason (which is not apparent to the States), a particular state wanted to take custody of a sexually dangerous offender about to be released from federal custody, § 4248 specifically provides for federal / state cooperation. In particular, the Attorney General is to "make all reasonable efforts" to place an individual committed under the federal law in the care of his or her home state or the state of original prosecution. 18 U.S.C. § 4248(d). If a state at any time agrees to take such a person, the Attorney General is to defer and transfer custody to the state. *Id.* The Adam Walsh Act also directs the Attorney General to make grants to states for "the purpose of establishing, enhancing, or operating effective civil commitment programs for sexually dangerous persons." 42 U.S.C. § 16971(a).

With respect to sex offender civil commitment, Congress has acted only in ways that respect federalism, choosing an overarching policy of federal and state cooperation. Thus, federal law creates in essence a right of first refusal for the States, and only utilizes grants (rather than a threat of withdrawal of federal funds, *cf. South Dakota v. Dole*, 483 U.S. 203 (1987)), to encourage states to adopt their own sex offender civil commitment programs. With such limited and respectful provisions, there is no crossing of any line between federal authority and traditional state police powers, nor is there any failure to respect the States' sovereignty.

One of federalism's core benefits is to allow the states to act as policy laboratories in which novel and differing approaches to challenging societal problems can be tested for the ultimate benefit and improvement of government and society. *See Smith v. Robbins*, 528 U.S. 259, 273 (2000); *Raich*, 545 U.S. at 42 (O'Connor, J., dissenting) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Far from stifling the States as laboratories, the federal program in this case itself participates in the marketplace of ideas, creating the potential for new and additional knowledge and insights into the best methods for treating sexually dangerous and mentally abnormal individuals. The narrow scope of the federal program and Congress' cooperative approach to the problem of dangerous and mentally abnormal sex offenders in federal custody ensure that any threats to federalism and the States' prerogatives are minimal, if not nonexistent here.

Furthermore, there are very practical reasons to prefer a system that includes a federal sex offender civil commitment program rather than relying solely on the state programs. One such reason is the significant cost of operating legitimate and effective programs, a cost that far exceeds typical prison costs. Another reason is that, because only 21 states have such programs, either those states alone would have to absorb all commitment candidates from the federal system, or the other 29 states would be compelled to start programs, or persons in federal custody designated for release in any of those 29 states would simply have to be let go, with no possibility of civil commitment for continuing care and treatment. The States find none of those options attractive.

Another practical consideration is that the class or classes of sexually dangerous persons likely to be committed to the federal program may vary from those committed to the state programs. To the extent that § 4248 commitments deal with individuals who have committed federal crimes, the federal program may well be better able to accommodate and treat the particular abnormalities and needs of those individuals. Some state programs, on the other hand, may be unsuited to assume custody of the types of individuals § 4248 addresses. Sex offenders are not fungible, and indeed suffer from a variety of mental abnormalities and personality disorders, some of which may well be more or less prevalent in the federal prison population than in the various state prison populations.

The federal program thus is fully consonant with the States' strong interest in the civil commitment and treatment of sexually violent offenders suffering from mental abnormalities that make them a continuing danger. Striking down the federal program would cause the loss of an important cooperative program *without any resulting benefit* to federalism's core principles or the interests of the States.

II. CONGRESS HAS POWER TO ENACT § 4248.

A. Congress Has Power Directly Under The Commerce Clause And Its Plenary Power Over Federal Territories To Regulate Offenders In Federal Custody.

Congress had the authority under the Necessary and Proper Clause to enact § 4248, but it also had such authority directly under its enumerated powers, an alternative basis for upholding the law. There is no dispute that Congress may legislate to regulate both persons who move in interstate commerce and the instrumentalities and channels of interstate commerce. *See, e.g., United States v. Lopez*, 514 U.S. 549, 558 (1995) ("Congress may regulate the use of the channels of interstate commerce"; "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."); *United States v. Morrison*, 529 U.S. 598, 609 (2000) (same); *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005) (same). Pursuant to the commerce power, Congress has criminalized the sexual exploitation of children and the possession and distribution of child pornography. 18 U.S.C. §§ 2251, 2252, 2252A, 2260.

Nor is there any doubt that Congress has plenary authority over federal territories. *See* U.S. Const. Art. IV, sec. 3 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States"); *see United States v. Lara*, 541 U.S. 193, 225 (2004) (Thomas, J., concurring) (citing *Reid v. Covert*, 354 U.S. 1, 13 (1957)). Pursuant to this express power, Congress has criminalized sexual abuse in U.S. territories. 18 U.S.C. §§ 2241-2244.

There is no dispute that the federal criminal laws cited above are within Congress' enumerated powers. Indeed, any person convicted of federal crimes and in federal custody already has a proven propensity to affect federal interests over which Congress has plenary authority. Furthermore, once such persons are validly in federal custody, the federal government has a legitimate federal interest in not releasing any dangerous and mentally abnormal sex offender into society without further care and treatment. Importantly, the federal interest exists irrespective of the precise federal offenses such persons may have committed in the past.

This Court has recognized that sex offenders present special challenges. *See, e.g., McKune v. Lile*, 536 U.S. 24, 32 (2002) ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.") Given the high recidivism rate among sex offenders, it is reasonably likely that such offenders will commit a federally prescribed offense once they are free to enter the channels and utilize the instrumentalities of interstate commerce. Accordingly, the federal government has both a vested interest in and the authority to regulate such persons in order to prevent the future commission of federal crimes.

Furthermore, given increasing restrictions on where released sex offenders may live, as well as the demonstrated problems with maintaining accurate and current sex offender registries (often because offenders move without notifying authorities), it is beyond doubt that many offenders will move across state lines following their release from federal custody. For these very reasons, Congress has created a national sex offender registry and notification system to track and monitor the locations of released sex offenders. The interstate aspects of protecting the public from dangerous and mentally abnormal sex offenders simply cannot be ignored. Certainly, the close connection with interstate commerce justifies a sex offender civil commitment program for the care and treatment of such offenders in federal custody.

Therefore, the federal program is a valid exercise of Congress' power under the Commerce Clause and its plenary power over federal territories, because the federal program is rationally related to reducing crimes against undisputed federal interests, by providing long term care and treatment for a particular class of persons with a proven record of committing sex crimes. Indeed, federal offenders with a propensity to commit sex crimes are never more than a drive across state lines, a commercial airline flight, or most easily and commonly the click of a computer mouse, away from committing future federal sex offenses. *Cf. Gonzales v. Raich*, 545 U.S. 1, 33, 40 (2005) (Scalia, J., concurring) ("As the Court explains, marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market"); *United States v. Tom*, 565 F.3d 497, 506 (8th Cir. 2009).[3]

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[3] Additionally, in upholding § 4248 against constitutional challenge, the Eighth Circuit observed that "many, if not most, federal sex offenders are . . . incarcerated outside the state of their domicile or the state in which they are convicted." 565 F.3d at 506. Given that fact, the Eighth Circuit opined that "it is not

B. Section 4248 Is A Proper Exercise Of Congress' Powers Under The Necessary And Proper Clause Because It Is A Rational and Appropriate Means For Effectuating Congress' Enumerated Powers.

The Necessary and Proper Clause allows Congress to legislate when the law is a rational and appropriate means for effectuating an enumerated power. *See Gonzales v. Raich*, 545 U.S. 1, 22 (2005); *id.* at 34-38 (Scalia, J., concurring); *M'Culloch v. Maryland*, 17 U.S. 316, 421 (1819). Almost seventy years ago, the Court held that

> [Congress] may choose means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the

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unreasonable to assume that upon completion of any prison term convicted sex offenders will travel outside of the state of incarceration, and may well have the intent to commit a federally prescribed sex offense." *Id.* If the Eighth Circuit's implicit factual premise is correct, that federal offenders will be released in the state of their incarceration (as opposed to being returned to their home state or state of conviction before being released), then *Tom* identifies yet another reason that interstate travel by released offenders seems likely and gives Congress authority to regulate their release.

> accomplishment of some purpose within an admitted power of the national government.

United States v. Darby, 312 U.S. 100, 121 (1941).

Only four years ago, the Court reaffirmed the rule of *Darby*, holding that when a federal law is challenged as beyond the scope of the Necessary and Proper Clause, a reviewing court asks simply whether Congress had a rational basis to believe that the challenged law was "reasonably adapted" to the execution of an enumerated power. *Raich*, 545 U.S. at 22. Stated another way, the question is whether Congress rationally concluded that § 4248 was reasonably adapted to effectuating laws enacted pursuant to Congress' enumerated powers. *See, e.g.*, *Sabri v. United States*, 541 U.S. 600, 605 (2004); *United States v. Morrison*, 529 U.S. 598, 637 (2000) (Souter, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 557 (1995); *id.* at 603, 607 (Souter, J., dissenting); *id.* at 617 (Breyer, J., dissenting); *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 276 (1981); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 303-304 (1964).

If so, the law is within Congress' power to enact. Because the civil commitment of sexually dangerous federal prisoners whose sentences are about to expire is a means reasonably adapted to the legitimate end of preventing future violations of federal laws enacted pursuant to Congress' enumerated powers, as explained below, the Necessary and Proper Clause authorizes § 4248.

Pursuant to the commerce power, Congress has criminalized the sexual exploitation of children and the possession and distribution of child pornography. 18 U.S.C. §§ 2251, 2252, 2252A, 2260. Pursuant to its plenary power over federal territories, Congress has criminalized sexual abuse in U.S. territories. 18 U.S.C. §§ 2241-2244. There is no dispute that these laws are validly enacted pursuant to Congress' enumerated powers.

Section 4248 is part of the Adam Walsh Act, in which Congress created a comprehensive scheme to make already-existing federal sex crime laws more effective:

> Congress enacted the Adam Walsh Act in order to [sic] "[t]o protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, [and] to promote Internet safety...." 120 Stat. at 587. Its legislative history makes clear that the Act was designed to be a "comprehensive bill to address the growing epidemic of sexual violence against children" and to "address loopholes and deficiencies in existing laws." H.R.Rep. No. 109-218, pt. 1 (2005). A Senate sponsor described the Act as "the most comprehensive child crimes and protection bill in our Nation's history." 152 Cong. Rec. S8012-02 (daily ed. July 20, 2006) (statement of Sen. Hatch). Among other measures, the Act strengthens federal criminal penalties for sexually exploitive and violent crimes against children, *see, e.g.*, § 206, 120 Stat. at 613 (codified as amended at 18 U.S.C. § 2241 (2006)), establishes a National Sex Offender Registry, *see* § 119, 120 Stat. at 596

> (codified at 42 U.S.C. § 16919 (2006)), and creates the civil commitment procedures at issue [in *Tom*], *see* § 302, 120 Stat. at 620-22 (codified at 18 U.S.C. § 4248 (2006)).

United States v. Tom, 565 F.3d 497, 499 (4th Cir. 2009).

In *Tom*, the Eighth Circuit pointed out that § 4248 is located in Title 18 of the United States Code, which "contains a vast number of criminal statutes enacted to give effect to Congress's enumerated powers, including those proscribing various sex offenses." 565 F.3d at 502. In similar contexts "Congress has determined that providing for civil commitment of persons in a variety of circumstances is necessary and proper to the functioning of federal criminal laws." *Id.* at 504 (citing 18 U.S.C. § 4241 (civil commitment of defendant unfit to stand trial), § 4243 (civil commitment of persons found not guilty by reason of insanity), § 4244 (commitment of persons sentenced to maximum period for offense committed), § 4245 (commitment of prisoner suffering from mental disease), § 4246 (commitment beyond prescribed incarceration period for prisoners whose release would create a substantial risk of bodily injury to another person or serious damage to the property of another)).

Under the federal statute, a "sexually dangerous person" is defined as "a person who has engaged or attempted to engage in sexually violent conduct or child molestation *and* who is sexually dangerous to others." 18 U.S.C. § 4247(a)(5) (emphasis added). The phrase "sexually dangerous to others" is itself defined to mean "that the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. § 4247(a)(6). To effect civil commitment under § 4248, the government must prove that the individual is a "sexually dangerous person" by clear and convincing evidence. 18 U.S.C. § 4248(d).

Applying rational basis review, the Eighth Circuit upheld § 4248 in *United States v. Tom*. Quoting *M'Culloch v. Maryland*, 17 U.S. at 420-21, the court recognized that the Necessary and Proper Clause "confers upon Congress 'the right to legislate on that vast mass of incidental powers which must be involved in the constitution' lest the Constitution be rendered 'a splendid bauble." The *Tom* court held that because Congress had the enumerated power to criminalize and punish the conduct of which Tom was guilty, it had "the ancillary authority under the Necessary and Proper Clause to provide for his civil commitment." 565 F.3d at 503-05. "The nexus between [the commitment] statutes and the enforcement of duly authorized federal criminal laws is evident. In each case the operation of the underlying federal criminal law would be frustrated without the related civil commitment provision." *Id.* at 504.

Indeed, as the *Tom* court pointedly observed:

> A propensity to engage in sexually violent conduct or child molestation can hardly be disassociated from the likelihood that a person may commit other types of sex related crimes that fall within federal jurisdiction, such as those involving internet child pornography, *see* 18 U.S.C. § 2252, or the use of the internet to

> solicit sexual activity from a minor, *see* 18 U.S.C. § 2422(b).

565 F.3d at 506. Therefore, "§ 4248 appears to be 'aimed at preventing the specific harm to the community proscribed by the [federal sex crime] statutes.'" *Tom*, 565 F.3d at 506 (internal citations omitted); *see also United States v. Shields*, 522 F. Supp. 2d 317, 326 (D. Mass. 2007) ("The civil commitment of those already in federal custody who, as a result of a mental condition, will likely commit sexually violent crimes does have a rational relation to congressional authority to proscribe and prevent such conduct."); *United States v. Dowell*, No. CIV-06-1216-D, 2007 WL 5364304, at *6 (W.D. Okla. Dec. 5, 2007) (same, quoting *Shields*).

The 21 existing state sex offender civil commitment programs—held constitutional in *Kansas v. Hendricks*, 521 U.S. 346 (1997)—are further conclusive proof that sex offender civil commitment programs are rational and appropriate means for furthering the purposes of the criminal laws. The federal program and the state programs are all intended, through therapy and rehabilitative treatment, to reduce the probability that sex offenders suffering from mental abnormalities will commit further federal and state offenses upon their release. *See Lile,* 536 U.S. at 32 ("'[T]he rate of recidivism of treated sex offenders is fairly consistently estimated to be around 15%,' whereas the rate of recidivism of untreated offenders has been estimated to be as high as 80%. 'Even if both of these figures are exaggerated, there would still be a significant difference between treated and untreated individuals.'"). The federal program, like the state programs, promises to reduce the number of future federal sex crimes committed by those who would otherwise be released without further care and treatment.

From a constitutional perspective, it makes no difference that the state laws authorizing such programs may rely upon general state police powers while Congress must rely upon enumerated powers and the Necessary and Proper Clause to enact § 4248. The rational basis that exists for concluding that § 4248 is reasonably adapted to effectuating the enumerated powers of Congress is all that is needed to sustain the law under the Necessary and Proper Clause.

C. The Rationale And The Result In *Greenwood v. United States*, 350 U.S. 366 (1956), Demonstrate That Congress Has The Constitutional Authority To Enact § 4248.

In *Greenwood v. United States*, 350 U.S. 366 (1956), the Court decided that the federal government has the constitutional authority to civilly commit a person in federal custody pending trial on federal charges when that person is determined to be mentally incompetent. The Court held that such commitment, "and therefore the legislation authorizing commitment," involved "an assertion of authority auxiliary to incontestable national power," and was "plainly within congressional power under the Necessary and Proper Clause," of the Constitution. *Id.* at 375. Because § 4248, like the law at issue in *Greenwood*, authorizes the civil commitment of persons properly in federal custody and who suffer from a mental abnormality making them dangerous to others, § 4248 is a legitimate exercise of

Congress' authority under the Necessary and Proper Clause.

The rationale and result in *Greenwood* fully support the constitutionality of § 4248, notwithstanding that a program like the one presently before the Court was not at issue in that case. Both the situation in *Greenwood* (pretrial commitment of a mentally incompetent defendant) and the situation presented here involve persons (1) lawfully in federal custody (2) who suffer from mental infirmities and (3) who continue to present a danger to society and federal interests. The same rationale that justified federal civil commitment in *Greenwood* is applicable in this case, namely that the federal government is "faced with the practical situation that it has lawful custody of a person whom it is not safe to let at large." 350 U.S. at 374.

In fact, the federal government's lawful claim to the person in custody is, if anything, much *stronger* in the current case, where the person has been duly convicted of one or more federal offenses, presumably has exhausted direct appeals and post-conviction remedies, and is coming to the end of a federal sentence of imprisonment. In *Greenwood*, the mentally incompetent defendant had not been convicted of a federal offense, had not been tried, had not taken a direct appeal or pursued post-conviction remedies, and had not served a federal sentence.

Where the federal government has lawful custody of an individual who is both dangerous and suffering from a mental abnormality, the federal government cannot be constitutionally powerless to provide for the commitment, care, and treatment of that person until such time as he no longer poses a threat to society and federal interests. As the Court recognized in *Greenwood*, the federal government has the authority to define federal crimes related to its enumerated powers, to establish penalties for violations, and to take custody, try, and sentence violators of those laws. Necessarily, then, Congress must also have the auxiliary authority to regulate the release of those persons lawfully in federal custody, as the Court held in *Greenwood*.

Indeed, "legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government." *United States v. Darby*, 312 U.S. 100, 121 (1941); *see also Everard's Breweries v. Day*, 265 U.S. 545, 559-60 (1924) ("Congress is not limited to such measures as are indispensably necessary to give effect to its express powers, but . . . may adopt any means . . . which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution."); *Ruppert, Inc. v. Caffey*, 251 U.S. 264, 299-301 (1920) (from express constitutional powers flow implied supporting powers).

In recognizing the connection between preventing the commission of federal crimes and the civil commitment of dangerous and mentally abnormal sex offenders about to be released from federal custody, the Eighth Circuit in *Tom* relied in part on *United States v. Perry*, 788 F.2d 100 (3d Cir. 1986). *Perry* concerned Congress' power to enact a law that provided for the pretrial commitment of persons indicted for various federal drug crimes. *See* 18 U.S.C. § 3142(e).

The *Perry* court upheld that federal law under the Necessary and Proper Clause, relying on *Greenwood*, which the Third Circuit held "teaches . . . that the federal government may resort to civil commitment when such commitment is necessary and proper to the exercise of some specific federal authority." 788 F.2d at 110. Applying that concept to pretrial commitments, the Third Circuit construed the federal statute at issue in *Perry* as intended to prevent the commission of additional federal drug crimes while the person awaits trial. Accordingly, the *Perry* court held that "because Congress has the power to proscribe the activities in question, it has the ancillary authority, under the necessary and proper clause, to resort to civil commitment to prevent their occurrence." *Id.* at 111.

Both the pretrial commitment law at issue in *Perry* and § 4248 are narrowly targeted to apply only to individuals likely to commit future federal crimes if released without care and treatment. Just as the law at issue in *Perry* furthered the purposes of federal drug laws by preventing the commission of future drug crimes, § 4248 targets a group most at risk of committing future federal sex offenses upon their release if they are not given the proper care and treatment.

In sum, the rationale and the result in *Greenwood* demonstrate that § 4248 is both necessary and proper to give full effect to federal criminal laws enacted pursuant to Congress' enumerated powers.

CONCLUSION

Section 4248 serves, rather than undermines, federalism, and Congress has the power to enact such a law. Accordingly, the judgment below must be reversed.

Respectfully submitted.

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UNITED STATES,

Petitioner,

v.

GRAYDON EARL COMSTOCK, JR., *et al.*

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus curiae, the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

Amicus curiae, the National Association of Federal Defenders ("NAFD"), was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, nonprofit, volunteer organization whose membership includes attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act.

Together, *amici curiae* write to address important, additional issues of particular relevance to the defense bar, concerning the procedural failings of the statute at issue in this case. In *Kansas* v. *Hendricks*, this Court emphasized that forcible civil commitment may be undertaken only in "narrow circumstances" and that the constitutionality of such detention depends on the availability of "proper procedures and evidentiary standards." 521 U.S. 346, 357 (1997). Although this Court narrowly concluded that the Kansas statute had sufficiently "strict procedural safeguards" to comport with due process requirements, *id.* at 368, 371, the statute now before the Court is dramatically different from the Kansas law. We therefore write not only in support of Respondents, but also in the spirit of Justice Kennedy's caution that the Court's holding in *Hendricks* might not withstand the test of time:

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certify that counsel of record for both parties received timely notice of *amici curiae*'s intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

> On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.

Hendricks, 521 U.S. at 373 (Kennedy, J., concurring).

SUMMARY OF THE ARGUMENT

This Court has upheld statutes that authorize the involuntary commitment of individuals only when they apply to individuals who are determined to be unable to control their behavior and thereby pose a threat to the public health and safety, and only if (1) the confinement takes place pursuant to proper procedures and evidentiary standards, (2) there is a finding of dangerousness either to one's self or to others, and (3) proof of dangerousness is coupled with proof of mental illness. *Kansas* v. *Crane*, 534 U.S. 407, 409-410 (2002); *Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992).

Section 4248 fails to satisfy these fundamental requirements of due process in the civil commitment context in at least three respects.[2] First, the lowered evidentiary threshold in the statute results in reliance on science and data that simply are not advanced enough to form the basis for detentions under § 4248. As Respondents point out, § 4248 is focused on preventing certain conduct that may happen at some future point. See Resp. Br. at 57 (quoting *United States* v. *Volungus*, 599 F. Supp. 2d 68, 76 n.9 (D. Mass. 2009)). Yet neither clinical predictions, nor actuarial assessments, nor any combination of the two has proven sufficiently accurate on a consistent basis to form the necessary legal foundation for the forcible, potentially indefinite detention authorized by § 4248. Such science may have a valid place in certain clinical contexts, but it is ill-suited and insufficiently accurate to meet the demands of due process required here.

Second, § 4248 applies more broadly and affords far weaker procedural process protections than the state statutory scheme narrowly upheld in *Hendricks*, 521 U.S. 346, or similar State laws.

Finally, as demonstrated both by the plain statutory text and by implementing regulations promulgated by the Bureau of Prisons ("BOP"), § 4248's enforcement turns on unconstitutionally vague terms that invite discriminatory application and thereby render the statute effectively standardless and, as such, void.

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[2] Although the government and Respondents have not raised all of the issues discussed herein in their respective briefs, this Court has long held that it will consider issues raised solely in an *amicus* brief, even though the issue was not presented in the petition for certiorari. *Davis* v. *United States*, 512 U.S. 452, 457 n.* (1994); *Teague* v. *Lane*, 489 U.S. 288, 300 (1989) (plurality opinion).

The sweeping nature of § 4248—in terms of the universe of individuals to whom it applies, the effectively unlimited types of evidence and behavior subsumed within its scope, and the dearth of procedural protections it affords—makes it a civil commitment statute that is "a mechanism for retribution or general deterrence," precisely the outcome Justice Kennedy cautioned against. *Hendricks*, 521 U.S. at 373.

ARGUMENT

I. DEPRIVATIONS OF LIBERTY BASED ON HIGHLY UNCERTAIN, MISAPPLIED, OR ILL-FITTED SCIENCE LEAD TO ARBITRARY GOVERNMENT ACTION AND VIOLATE DUE PROCESS.

Generalized attempts to predict dangerousness for specific individuals lack the reliability necessary to form a basis for the indefinite civil detentions authorized by § 4248. Reliance on equivocal data leads to arbitrary government action, which violates due process. See *Foucha*, 504 U.S. at 80 ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."). "[W]e must be mindful that the function of legal process is to minimize the risk of erroneous decisions." *Addington* v. *Texas*, 441 U.S. 418, 425 (1979) (citing *Mathews* v. *Eldridge*, 424 U.S. 335 (1976)); see also *Heller* v. *Doe*, 509 U.S. 312, 332 (1993) (fundamental to the prevention of unfair and mistaken deprivations is the need to ensure "the accurate determination of the matters before the court."). Accordingly, this Court has held that due process is satisfied "[s]o long as the accuracy of the adjudication is unaffected," *id.*, and has observed that the "known or potential rate of error" of evidence bears on the question "whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue." *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594 (1993).

In the context of prediction science, such accuracy has not been demonstrated. Indeed, the opposite is true. The widespread use of such science in connection with § 4248 proceedings—owing in part to the statute's relaxed evidentiary standard (see *infra*)—violates due process.

A. Section 4248 Leads To Arbitrary Government Action By Authorizing Indefinite Civil Commitment Based On Lowered Evidentiary Standards That Apply Broadly And Lack Meaningful Limitations.

The commitment criteria of § 4248 and prior civil commitment statutes rest on the idea that the government may detain individuals who have a current illness that leads them to pose a danger to themselves or the community. See Pet. Br. at 18.[3] In arguing its position, the government repeatedly refers to the class of individuals traditionally subject to civil commitment as "insane" or "mentally ill", *e.g.*, Pet. Br. at 2-4, 17, 23-24, 26-29, 32-33, 36-39, 46—despite the fact that § 4248 authorizes commitment based on far less than "illness," requiring only the presence of an undefined condition termed "abnormality." This is more than mere truncation on the Petitioner's part, for although the term "mental abnormality" was deemed sufficient in *Hendricks*, the validity of that phrase in the civil commitment context was upheld narrowly and with much skepticism about imprecision and potential for overly broad or arbitrary application. 521 U.S. at 373 (Kennedy, J., concurring).

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[3] Notably, the government states that "civil commitment protects against the release of a person in government custody whose mental condition is *known* to pose a danger to the public." Pet. Br. at 32 (emphasis added). Yet, as discussed herein, data regarding dangerousness predictions indicate that there is no way to *know* which individuals "pose a danger to the public"—particularly as a result of the person's "mental condition."

Moreover, final regulations promulgated by the BOP to implement the certification process required by § 4248[4] add no meaningful specificity to the statute's terms or evidentiary standards. In fact, they take the process in the opposite direction. For example, the regulations provide that the BOP "will consider *any* available information in its possession" for purposes of determining that an individual is a "sexually dangerous person." 28 C.F.R. § 549.90(c) (emphasis added). Similarly, the BOP regulations disclaim any limitations on the evidence that can be used to determine that a person "will have 'serious difficulty refraining from sexually violent conduct or child molestation if released.'" 28 C.F.R. § 549.95 (enumerating five types of evidence that BOP mental health professionals may consider, but noting that professionals "are not limited to" the types of evidence listed). Included as permissible evidence for these determinations is information "[e]stablished through interviewing and testing of the person or through other risk assessment tools that are relied upon by mental health professionals" or by "[i]ndicating successful completion of, or failure to successfully complete, a sex offender treatment program." 28 C.F.R. § 549.95(c), (e).

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[4] Courts may look at an agency's interpretation of a statute for guidance, particularly where the agency is charged with administering the provision in question, as the BOP is in this case, and particularly where the regulations speak to ambiguities which Congress did not address in the statute itself. *United States* v. *Abregana*, 574 F. Supp. 2d 1123, 1144 (D. Haw. 2008); *see also Chevron* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); *Morales* v. *Sociedad Espanola de Auxilio Mutuo y Beneficencia*, 524 F.3d 54, 57 (1st Cir. 2008).

In its practical application, then, § 4248 creates a lowered evidentiary threshold that allows a person's statements and interactions with mental health professionals in treatment to provide the basis for extending a prison sentence through the mechanism of civil commitment. Moreover, as discussed below, the broad expansion of allowable evidence also results in reliance on clinical predictions and actuarial tools that, while perhaps valid in certain clinical contexts, are neither accurate nor appropriate for purposes of predicting the future sexual dangerousness of *specific persons*.

B. Section 4248 Rests On An Incorrect Assumption That The Individuals Who Will Commit Future Sex Offenses Can Be Identified Accurately.

The underlying policy justification of § 4248 relies on the theory of recidivism—the idea that someone who has engaged or attempted to engage in a type of behavior in the past will repeat that behavior in the future. Legislative history shows that Congress subscribed to the theory of recidivism in drafting § 4248. See H.R. Rep. No. 109-218, pt. 1, at 22-23 (2005) ("Sex offenders have recidivism rates that often exceed those of other criminals."). Notably, however, the recidivism rates Congress pointed to when crafting § 4248 were relatively low. Congress highlighted the Department of Justice's most recent data, showing that, in a survey across fifteen states in 1994, only 5.3% of 9,691 sex offenders released from prison were arrested for a new sex crime within three years of release, meaning that 94.7% of released sex offenders had *not* recidivated. *Id.*[5] Further, as discussed *infra*, more recent data, including data from researchers who developed the actuarial tool most frequently used to predict dangerousness in the context of civil commitment proceedings, suggest that sex-offender recidivism rates are significantly lower than those reflected in older data, and that previously established statistical norms for estimates of recidivism risk are no longer valid.

The central question in cases under § 4248 is not one of statistics, but of *individuals*—how to determine which specific persons pose a danger to society due to a serious mental condition that results in the person having "serious difficulty in refraining" from certain conduct in the future. The tools used to predict sexual dangerousness in hearings under § 4248 are not designed to answer this question. They are designed to show only group patterns, not an individual's behavior or capacity for self-control. "[P]redictions of danger lack scientific rigor," and "[s]cientific studies indicate that some predictions do little better than chance or lay speculation, and even the best predictions leave substantial room for error about individual cases." Alexander Scherr, Daubert *& Danger: The 'Fit' of Expert Predictions in Civil Commitments*, 55 Hastings L.J. 1, 2-3 (2003).

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[5] Moreover, much of the data cited by Congress in that report was generated from polygraph studies—a method of collecting data that the government itself has argued has significant error rates. *See United States* v. *Scheffer*, 523 U.S. 303, 310 (1998).

Although there is no dispute that mental health professionals can be helpful in assisting judges to understand individuals' mental states, literature and data from the past thirty years suggest that, when it comes to predicting which individuals will commit offenses in the future, professionals' predictions are neither accurate nor reliable for purposes of legal determinations affecting a person's liberty interests.[6] See *Daubert*, 509 U.S. at 590 ("[T]he requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability."); *Johnson* v. *Noot*, 323 N.W.2d 724, 728 (Minn. 1982) ("'Neither psychiatrists nor other behavioral scientists are able to predict the occurrence of violent behavior with sufficient reliability to justify the restriction of freedom of persons on the basis of the label of potential dangerousness. Accordingly, it is recommended that courts no longer ask such experts to give their opinion of the potential dangerousness of any person.'" (quoting a mental health professional expert witness)). "Overall, the theory that scientific reliability underlies predictions of future dangerousness has been uniformly rejected by the scientific community, absent those individuals who routinely testify to, and profit from, predictions of dangerousness." *Willis* v. *Cockrell*, No. P-01-CA-20, 2004 WL 1812698, at *34 n.275 (W.D. Tex. Aug. 9, 2004).

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[6] *See, e.g.*, Marilyn Hammond, Comment, *Predictions of Dangerousness in Texas*, 15 St. Mary's L.J., 141, 141-42 (1980) ("Reliance by the courts on testimony by psychotherapists may be misplaced, since the ability to accurately predict dangerousness has not been demonstrated."); Stephen Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. Cal. L. Rev. 527, 600 (1978) ("In general, mental health professionals . . . [w]hen predicting violence, dangerousness, and suicide . . . are far more likely to be wrong than right."); Bernard Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. Pa. L. Rev. 439, 444-45 (1975) ("There are a number of statistical studies which amply demonstrate that the predictions of dangerousness by psychiatrists are unreliable. . . . The findings so consistently demonstrate that psychiatrists over-predict dangerousness by huge amounts that the reports [of unreliability] must be taken seriously."). *See generally* John S. Carbone, *"Into the Wonderland of Clairvoyance": Faulty Science and the Prediction of Future Dangerousness*, *in* Malingering, Lies, and Junk Science in the Courtroom 533-73 (Jack Kitaeff ed., 2007).

As observed in a recent article,

> The sharpest critiques find that mental health professionals perform no better than chance at predicting violence, *and perhaps perform even worse*. . . . [W]e might predict that no court would admit predictive opinions under *Daubert* or *Frye*. Yet . . . courts have shown an extraordinary receptiveness to such opinions, admitting and relying on them in their commitment decision-making.

Scherr, *supra*, at 2-3 (emphasis added). Accord Erica Beecher-Monas & Edgar Garcia-Rill, *Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-*Daubert *World*, 24 Cardozo L. Rev. 1845, 1847-55 (2003) ("[L]ay people can predict future dangerousness as well as medical experts. . . . Although the testimony of clinicians about future dangerousness offers little more than that of an astrologer, such clinical testimony is pervasive, and courts persist in circumventing any inquiry into the scientific validity of expert future dangerousness predictions.").[7]

Petitioner points to the Restatement (Second) of Torts as authority for a custodian's duty to third parties when the custodian "takes charge of a person who is likely to cause harm if not controlled." Pet. Br. at 32. Yet the Restatement (Third) of Torts contains a caution about the high error rate of data regarding experts' ability to determine "who is likely to cause harm": "Even with relatively sensitive tests for dangerousness, a substantial number of false positives occur because of the low base rate of dangerousness among the patient population." Restatement (Third) of Torts: Liability for Physical Harm, Affirmative Duties, Duty to Third Persons Based on Special Relationship with Person Posing Risk § 41 (2005). What these, and numerous other commentaries, studies, and judicial opinions, indicate, is that the science of predicting sexual dangerousness is too limited to serve as a predicate for civil commitment under a statute as sweeping as § 4248.

C. The Limitations And Flaws Of Prediction Science Render It Inadequate As A Basis For Prolonged Post-Conviction Detention Under Section 4248.

Mental health professionals' predictions of dangerousness come from one or both of two types of assessments: (1) assessments based on clinical judgment, and (2) assessments based on actuarial instruments developed primarily over the most recent decade. See R. Karl Hanson & Kelly E. Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, 21 Psychological Assessment 1, 3 (2009). Available and recent data show, however, that for accurate predictions of dangerousness neither of these methods is sufficient alone—nor are they materially better together.

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[7] *Compare* Resp. Br. at 53 ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack." (quoting *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 18 (1991)) (emphasis in original)).

First, when clinicians are asked to subjectively make a judgment whether a sexual offender will reoffend, such clinical judgment is wrong between 72% and 93% of the time. Richard Wollert, *Low Base Rates Limit Expert Certainty When Current Actuarials Are Used to Identify Sexually Violent Predators*, 13 Psychol. Pub. Pol'y & L. 56, 58 (2006). These prediction rates are far worse than blind chance—and far below what due process demands. Another study asked psychiatrists and nurses in psychiatric emergency rooms to predict future dangerousness in the patients they examined. In that study, only about half (53%) of the patients deemed at risk of violence in fact became violent. John Monahan *et al.*, *Violence Risk Assessment: The Law and the Science*, *in* Rethinking Risk Assessment: The MacArthur Study of Mental Disorder and Violence 3, 5 (2001). Thus, clinicians' predictions of dangerousness were as likely to be incorrect as correct.

These recent data are consistent with those noted by the American Psychiatric Association (APA) in its 1996 *amicus* brief filed in *Kansas* v. *Hendricks*. There, the APA noted that "the research literature shows that mental health professionals can generally make sound expert predictions of violence only as matters of probabilities, which are 'rarely above 50%' and often substantially less." Brief for American Psychiatric Association as Amicus Curiae in Support of Leroy Hendricks, *Kansas* v. *Hendricks*, 521 U.S. 346, 1996 WL 469200, at *18 (citing Grisso & Appelbaum, *Is It Unethical To Offer Predictions of Violence?*, 16 Law & Hum. Behav. 621, 626 (1992)).

This Court also has recognized the limitations of expert psychiatric/psychological predictive testimony. See *Addington*, 441 U.S. at 429 ("Given the lack of certainty and the fallibility of psychiatric diagnoses, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous."); see also *Heller*, 509 U.S. at 323-24 ("Manifestations of mental illness may be sudden, and past behavior may not be an adequate predictor of future actions. . . . It is therefore no surprise that psychiatric predictions of future violent behavior by the mentally ill are inaccurate.").

Second, actuarial tools fare no better than clinical predictions in terms of predicting which individuals will recidivate. Actuarial tools are diagnostic assessments that ask an offender a number of questions in order to understand how many "recidivism risk factors" an offender exhibits, and how the offender's "score" compares to a sample group of offenders. See generally John Monahan, *Structured Risk Assessment of Violence*, *in* Textbook of Violence Assessment and Management (R. Simon & K. Tardiff eds., 2008); Hanson & Morton-Bourgon, *supra*. Although many researchers emphasize the improved rates that actuarial assessments often demonstrate as compared to clinicians' judgment in the absence of such tools, see, *e.g.*, Wagdy Loza, *Predicting Violence and Recidivism Among*

Forensic/Correctional Population, Arabpsynet eJournal (Nov.-Dec. 2004), *available at* http://www.arabpsynet.com/archives/op/OPj4.LOZAWagdy.PredictingViolence.pdf, these improvements are modest and do not raise the accuracy rates of sexual dangerousness predictions to a level adequate to satisfy due process. Dr. Loza, for example, noted that in the context of violent recidivism the use of an actuarial tool raised prediction accuracy rates to 53% (or, 47% *inaccuracy*), up from a mere 40% accuracy through clinical judgment alone. *Id.* This is yet more evidence that the science of predicting future dangerousness yields, at best, a 50-50 chance of inaccuracy and is therefore too limited in design and function to fulfill the uses to which it is put under § 4248. See *Daubert*, 509 U.S. at 591 (noting that "scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes").

For example, the Static-99, one of the most widely used actuarial tools available, see Hanson & Morton-Bourgon, *supra*, at 1, results in a "score" but, critically, does not and cannot measure an individual's risk of reoffending. Static-99 FAQ, *at* http://www.static99.org/pdfdocs/faq.pdf ("For the recidivism risk estimates, evaluators should be careful to mention that the estimates are group averages and the risk presented by the offender may be higher or lower depending on factors not measured by Static-99.").[8] Rather, it merely associates an individual with a group sharing certain characteristics. R. Karl Hanson, *Does Static-99*

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[8] "[An] interview with the offender is not necessary to score the STATIC-99." Andrew Harris *et al.*, STATIC-99 Coding Rules Revised—2003, at 3 (2003), *available at* http://ww2.ps-sp.gc.ca/publications/corrections/pdf/Static-99-coding-Rules_e.pdf (last visited Nov. 2, 2009).

Predict Recidivism Among Older Sexual Offenders? 18 Sexual Abuse: A Journal of Research and Treatment 343 (2006) (noting that Static-99 uses only static, historical factors, and does not directly measure the enduring psychological traits that are presumed to motivate sexual offending).

Further, the Static-99 does not—and cannot—distinguish between those at risk of reoffending due to choice, as opposed to a lack of volitional control. Yet assurance that civil commitment decisions would be made on the basis of deficient behavioral control, not as a mechanism for retribution or general deterrence, was precisely what this Court relied on to conclude that the statute at issue in *Hendricks* did not run afoul of due process. *Hendricks*, 521 U.S. at 360 (finding that Hendricks's "*admitted lack of volitional control*, coupled with a prediction of future dangerousness" sufficed for due process purposes) (emphasis added); *id.* at 358 (discussing aspects of the Kansas statute that "serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control," and focusing on the criterion that the person's mental condition "makes it difficult, if not impossible, for the person to control his dangerous behavior"); *id.* (describing valid civil commitment statutes as those that "narrow[] the class of persons eligible for confinement to those who are unable to control their dangerousness"); *id.* at 375 (Breyer, J., dissenting) ("Hendricks' abnormality does not consist simply of a long course of antisocial behavior, but rather it includes a specific, serious, and *highly unusual inability to control his actions*.") (emphasis added). The use of actuarial tools is utterly irrelevant to this critical question. See *Daubert*, 509 U.S. at 591-92 ("Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.").

At least one court has found that the Static-99 is inadmissible for proving the "mental abnormality" prong of sexual dangerousness. *New York* v. *Rosado*, No. 250294, 2009 WL 1911953, at *9 (N.Y. App. Div. June 29, 2009) ("[T]here are . . . drawbacks and inadequacies in the STATIC-99. It is only moderately accurate for the use intended."); *id.* at 15 ("Most significantly, the respondent's two experts agreed with the petitioner's three experts that the STATIC-99 does not assess volitional impairment . . . [and] cannot tell you whether a specific individual is volitionally impaired."). Like assessments based on clinical judgments, "in predicting whether an individual is more likely than not to recidivate consistent with the group's percentage rate of recidivism, 'the STATIC-99 cannot do much better than a coin flip.'" *Id.* at *9 (quoting Berlin, Galbreath, Geary, McGlone, *The Use of Actuarials at Civil Commitment Hearings to Predict the Likelihood of Future Sexual Violence*, 15 Sexual Abuse: A Journal of Research and Treatment 377, 381 (2003)); see also John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 Va. L. Rev. 391, 407 (2006) (summarizing a recent review of court-ordered pre-trial risk assessments, which found that only 39% of the defendants rated by clinicians as having a "medium" or "high" likelihood of being violent to others were reported to have committed a violent act during a two-year follow-up—meaning 61% of medium- to high-risk predictions were incorrect).

In fact, the Static-99 was recently revised by its own creators because they determined that, "[i]n more recent samples, the sexual recidivism rates were lower than the rates observed in the original developmental samples." See Static-99 FAQ, *supra*. The tool's authors are now collecting and analyzing data to try to create new norms. In the meantime, however, experts testifying at sexual dangerousness hearings under § 4248 have continued to use the admittedly outdated Static-99 norms—and their *overpredictions* of recidivism risk—as a basis for their evaluations and opinions.[9] As noted in *Rosado*, the Static-99 developers recently stated that

> [s]exual and violent recidivism rates per Static-99 score are significantly lower in our data than they were in the samples used to develop the original Static-99 norms (reported in Harris, Phenix, Hanson, & Thornton, 2003). Even though we have yet to finish our analyses, the evidence is sufficiently strong that we believe the new norms should replace the original norms.

2009 WL 1911953, at *20 (quoting Hanson, Helmus & Thornton, *Reporting Static-99 in Light of New Research on Recidivism Norms* (Feb. 2009)). Actuarial tools, while perhaps informative for clinical purposes, do not provide an adequate basis for the potentially indefinite detention of specific individuals.

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[9] *See, e.g.*, Transcript of Proceedings (Day 2), at 10, 19, 44, 50-51, *United States* v. *Carta*, No. 07-12064-JLT (D. Mass. Feb. 10, 2009) (testimony of Dr. Amy Phenix, noting the new data yet explaining her reliance on Static-99 and its original norms for purposes of assessing Mr. Carta's risk of recidivism). Additionally, Dr. Hanson and his colleagues have developed the Static-2002, which "represents a conceptual overhaul to the Static-99," in which two items were dropped, six were added, and questions now represent five scales intended to account for dynamic factors such as age, persistence of sexual offending, deviant sexual interests, relationship to victims, and general criminality. Static-99 FAQ, *supra*. However, experts conducting evaluations for purposes of Section 4248 continue to use and tout the "widely accepted" nature of the Static-99.

While the infirmity of the evidence most often used to enforce § 4248 is patent, that does not mean that there exists no evidence that could support a finding of future dangerousness under proper evidentiary standards. Evidence stemming from convictions and a specific, individualized diagnosis of lack of control, for example, might serve to prove beyond a reasonable doubt that further incarceration is warranted. What is clear, however, is that the broad application of § 4248 as applicable to all persons in the custody of the BOP regardless of the basis for that custody, and the lax evidentiary standards of the statute, have in fact resulted in reliance upon evidence that simply cannot measure up to any legal yardstick of reliability. Coupled with its further procedural and vagueness failings as described below, § 4248 cannot survive scrutiny under this Court's due process precedents.

II. SECTION 4248 FAILS TO PROVIDE THE PROCEDURAL SAFEGUARDS THAT THIS COURT FOUND TO BE ADEQUATE IN *KANSAS* V. *HENDRICKS*, AND THAT ARE INCLUDED IN COMMITMENT STATUTES IN OTHER STATES.

1. The government attempts to depict § 4248 as similar to, and a logical outgrowth of, the statute upheld in *Hendricks*, 521 U.S. 346. See Pet. Br. at 39 ("*Like the similar state legislation*, the . . . Adam Walsh Act created a form of civil commitment specifically focused on individuals with a mental illness. . . .") (emphasis added). However, a careful comparison of the two statutes reveals that § 4248 provides significantly less due process protection than the Kansas statute in five important respects.

First, § 4248 fails to mandate a pre-hearing psychiatric or psychological examination. The Kansas statute required that all individuals subject to initial commitment be given a psychiatric or psychological examination. Kan. Stat. Ann. § 59-29a05(d) (1994) ("If [a probable cause] determination is made, the judge *shall* direct that person be taken into custody and the person *shall* be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator.") (emphasis added). Section 4248, on the other hand, provides only that a court "*may* order . . . a psychiatric or psychological examination of the defendant." 18 U.S.C. § 4248(b) (emphasis added). Thus, § 4248(b) leaves the issue of such an evaluation to the discretion of the district court—which, if it decides not to require an evaluation, can proceed directly to a hearing and make a determination regarding sexual dangerousness without any evaluation of the individual's mental condition having been conducted.

In *Ake* v. *Oklahoma*, this Court held that when a criminal defendant "has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial," constitutional due process guarantees require that the state provide indigent defendants with "access to a psychiatrist's assistance." 470 U.S. 68, 74 (1985). Although the Adam Walsh Act is not a criminal law directly within the purview of *Ake*,[10] the justifications underlying that decision are equally applicable to § 4248 commitment hearings—and mandate that an inmate be given a psychiatric or psychological examination by an evaluator of the inmate's designation prior to the hearing. As the Court recognized in *Ake*, individuals have a "uniquely compelling" liberty interest "in the accuracy of the . . . proceeding that places the individual's life or liberty at risk." *Id.* at 78. When the government has made the defendant's mental condition a relevant issue, the assistance of a psychiatrist or psychologist of the defendant's designation "may well be crucial to the defendant's ability to marshal his defense." *Id.* at 81.

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[10] Although *Ake* was decided under the Due Process Clause of the Fourteenth Amendment, courts have repeatedly recognized that the Due Process Clauses of the Fifth and Fourteenth Amendments should be applied and interpreted in the same manner when two situations present identical questions "differing only in that one involves a proscription against the federal government and the other a proscription against the

Second, § 4248 fails to provide individuals with important trial rights available under the Kansas statute. Whereas the latter required that the state prove its case beyond a reasonable doubt, § 4248 imposes the less demanding standard of "clear and convincing evidence." Compare Kan. Stat. Ann. § 59-29a07, with 18 U.S.C. § 4248(d) (2006). The Kansas statute also guaranteed individuals facing commitment two other important trial rights absent in § 4248: the right to a jury trial and the right to "review documentary evidence presented by the State." *Hendricks*, 521 U.S. at 353 (citing Kan. Stat. Ann. §§ 59-29a06-07); see 18 U.S.C. §§ 4248(c)-(d), 4247(d).

Third, § 4248 sweeps far more broadly than the Kansas statute, demonstrating that it is an unconstitutional "mechanism for retribution or general deterrence," *Hendricks*, 521 U.S. 373 (Kennedy, J., concurring), rather than a mechanism for treatment of mental illness. § 4248 applies to *any*

States." *See, e.g.*, *Morgan* v. *Woessner*, 997 F.2d 1244, 1255 (9th Cir. 1993).

person in the custody of the BOP, or who has been committed to the custody of the Attorney General pursuant to 18 U.S.C. § 4241(d), or "against whom all criminal charges have been dismissed solely for reasons relating to the [person's] mental condition." 18 U.S.C. § 4248(a). By contrast, the Kansas statute applied only to persons previously "convicted of or charged with" at least one of twelve specifically-defined sexually violent offenses. Kan. Stat. Ann. § 59-29a02(a); see *Hendricks*, 521 U.S. at 364 ("[T]he Kansas Legislature has taken great care to confine only a narrow class of particularly dangerous individuals.").

This difference in scope is particularly significant in light of the fact that less than two percent of federal convictions are for the combined categories of violent sexual offenses, "obscene material," and "non-violent sex offenses." See *United States* v. *Comstock*, 551 F.3d 274, 282 n.8 (4th Cir. 2009) (citing Bureau of Justice Statistics, U.S. Dep't of Justice, *Compendium of Federal Justice Statistics*, 2003, at 62 tbl.4.2 (2005), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs03.pdf). As a result, § 4248 authorizes certification and potential commitment of a significant number of persons with no criminal history of sexual misconduct, such as "individuals . . . serving time for bank robbery, mail fraud, tax evasion, [or] drug dealing." *United States* v. *Comstock*, 507 F. Supp. 2d 522, 557 (E.D.N.C. 2007). Section 4248, unlike the Kansas statute, therefore can be applied to individuals who have never even been charged with, much less convicted of, a crime, such as material witnesses under the supervision of the Attorney General. See Resp. Br. at 26 n.9.

Fourth, the statute upheld in *Hendricks* contained time limitations for the trial or hearing that have no counterpart in § 4248.[11] As the Fourth Circuit noted, the lack of timing guidelines in § 4248 may account for the fact that most individuals committed pursuant to that section in North Carolina and Massachusetts "had already served all, or almost all, of [their] prison term when the Attorney General certified [them] for [] additional confinement." *Comstock*, 551 F.3d at 278 n.3.

Fifth, § 4248 permits certification without a demonstration of probable cause with respect to an individual's sexual dangerousness. See 18 U.S.C. § 4248(a); see also *United States* v. *Shields*, 522 F. Supp. 2d 317, 334 (D. Mass. 2007); compare *Hendricks*, 521 U.S. at 352 (citing Kan. Stat. Ann. § 59-29a05). Indeed, § 4248 allows an individual to be certified—and his release thus automatically stayed—regardless of what justification, if any, supports the certification.

Taken together, these differences demonstrate that § 4248 fails to provide the procedures and evidentiary standards that this Court cited as the basis of its conclusion in *Hendricks* that the Kansas statute met due process requirements. *Id.* at 357. Moreover, because § 4248 reaches a considerably broader class of individuals than the Kansas statute, it is not limited to the "narrow circumstances" at issue in *Hendricks*. *Id.* For those reasons alone, the result below should be affirmed.

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[11] *Compare* Kan. Stat. Ann. §§ 59-29a03-04, 06 (1994) (providing that the custodian of an individual suspected to be a sexually violent predator must notify prosecuting attorneys "60 days prior" to the individual's release, that prosecutors must file a petition seeking commitment "within 45 days" of receipt of such notification, and that a trial must be held "[w]ithin 45 days after the filing of a [prosecutor's] petition"), *with* 18 U.S.C. §§ 4248(a)-(c). Section 4248, merely provides that if the District Court orders an examination pursuant to Section 4248(b), that order triggers a series of time limitations on the period during which the individual may be committed for purposes of conducting the examination. *See* 18 U.S.C. § 4247(b) (2006).

2. In addition to these procedural shortcomings, § 4248 also provides significantly less protection under its evidentiary standard than most other state laws authorizing civil commitment of sexually violent persons ("SVP laws"). Of the nineteen currently enacted state SVP laws applicable to adults, more than half require proof beyond a reasonable doubt prior to commitment.[12] Moreover, a significant majority of the states that use the "clear and convincing" standard require proof of a prior conviction, guilty plea, or finding of innocence by reason of mental defect for sexual misconduct prior to commitment.[13] This additional prerequisite moves the "clear and convincing" evidence standard much closer to a requirement of proof beyond a reasonable doubt. Regardless of whether it is permissible to require only "clear and convincing" evidence of the presence of a "serious mental illness, abnormality, or

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[12] *See* Ariz. Rev. Stat. § 36-3707; Cal. Welf. & Inst. Code § 6604; 725 Ill. Comp. Stat. 207/35; Iowa Code § 229A.7; Kan. Stat. Ann. § 59-29a08; Mass. Ann. Laws ch. 123A § 14; S.C. Code Ann. § 44-48-100; Tex. Health & Safety Code Ann. § 841.062; Wash. Rev. Code § 71.09.060; Wis. Stat. § 980.05.

[13] *See* Fla. Stat. § 394.912-13(2); Mo. Rev. Stat. § 632.480(5); Neb. Rev. Stat. Ann. §§ 83-174.01(1), 71-1203(1); N.H. Rev. Stat. Ann. § 135-E:2; N.J. Stat. Ann. §§ 30:4-27.26, 30:4-27.27(a); N.Y. Men. Hyg. Law §§ 10.03(f)-(g); Va. Code Ann. § 37.2-900. *But see* Minn. Stat. § 253B.01(7a), (18c) (requiring only prior "harmful sexual conduct"); N.D. Cent. Code § 25-03.3-01(8) (imposing a similar prior conduct requirement).

defect," such a standard is plainly insufficient with respect to § 4248's predicate element of the person having previously "engaged or attempted to engage in sexually violent conduct or child molestation," as such conduct is deviant and typically criminal in nature. See *In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against convictions except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

Indeed, regardless of their standards of proof, sixteen of the nineteen current state SVP laws may be applied *only* to individuals who have previously been found guilty of sexual misconduct, or who have either pled guilty to such charges or been found innocent by reason of mental defect.[14] A seventeenth state, Kansas, restricts its current statute to individuals "convicted of or charged with" one of thirteen sexually violent offenses. Kan. Stat. Ann. § 59-29a02(a). Thus, nearly 90% of current state SVP laws, including the Kansas statute narrowly upheld by this Court in *Hendricks*, apply to a smaller, more targeted population than does § 4248, which applies to any individual in the custody of the BOP or the Attorney General, regardless of whether those individuals have been convicted of or charged with prior sexual misconduct. See 18 U.S.C. § 4248(a).

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[14] *See* Ariz. Rev. Stat. § 36-3701(7); Cal. Welf. & Inst. Code § 6600(a); Fla. Stat. § 394.912-13(2); 725 Ill. Comp. Stat. 207/5(f); Iowa Code § 229A.2(11); Mass. Ann. Laws ch. 123A § 1; Mo. Rev. Stat. § 632.480(5); Neb. Rev. Stat. Ann. §§ 83-174.01(1), 71-1203(1); N.H. Rev. Stat. Ann. § 135-E:2; N.J. Stat. Ann. §§ 30:4-27.26, 30:4-27.27(a); N.Y. Men. Hyg. Law §§ 10.03(f)-(g); S.C. Code Ann. § 44-48-30(1); Tex. Health & Safety Code Ann. § 841.003; Va. Code Ann. § 37.2-900; Wash. Rev. Code § 71.09.020(18); Wis. Stat. § 980.01(7).

III. SECTION 4248 IS VOID FOR VAGUENESS.

Numerous terms in § 4248—including "sexually violent conduct," "child molestation," "serious illness, abnormality or disorder," and "serious difficulty"—are so insufficiently defined as to leave interpretation to the whim of the enforcer. The resulting vagueness invites an impermissible "standardless sweep" driven by the predilections of the enforcement body against disfavored persons. *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983) (citing *Smith* v. *Goguen*, 415 U.S. 566, 575 (1974)). That deficiency, by itself, renders § 4248 unconstitutional.

A. Statutory Language.

A statute violates the Due Process Clause when it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States* v. *Williams*, 128 S. Ct. 1830, 1835 (2008) (citing *Hill* v. *Colorado*, 530 U.S. 703, 732 (2000)); see also *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972). Under that standard, § 4248 is plainly void for vagueness.

For purposes of § 4248, 18 U.S.C. § 4247 defines a "sexually dangerous person" as one who "has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others," and who suffers from a "serious mental illness, abnormality, or disorder" such that he would "have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. § 4247(a)(5)-(6) (2006). However, Congress provided no definitions for several vague terms in this statutory provision. For example, neither "sexually violent conduct" nor "child molestation" is defined. Thus, a "person of ordinary intelligence" would not know what offenses fall within those definitions.[15]

Section 4248 is also void for vagueness because it uses the nebulous term "serious difficulty," which on its face recalls quintessential void-for-vagueness terms, such as "annoying" and "indecent," that call for "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings."[16] *Williams*, 128 S. Ct. at 1846 (citing

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[15] Determining the meaning of the word "violent" in itself has proven to be a difficult task for this Court, lower courts, and administrative agencies, confirming that the phrase "sexually violent conduct" is far from clear. In fact, even when Congress has enacted statutes which (in contrast to Section 4248) have provided definitions of phrases invoking the words "violent" or "violence," this Court, lower courts, and administrative agencies have been sharply divided about the meaning of those words and phrases. *See Begay* v. *United States*, 128 S. Ct. 1581 (2008) (demonstrating substantial division between the majority, concurring, and dissenting opinions as to whether driving under the influence of alcohol ("DUI") is a "violent felony" for purposes of sentencing under the Armed Career Criminal Act); *see also Leocal* v. *Ashcroft*, 543 U.S. 1 (2004) (highlighting the various court and agency interpretations of the phrase "crime of violence," as defined in 18 U.S.C. § 16, with regard to whether DUI is a "crime of violence" for purposes of deportation under § 237(a) of the Immigration and Naturalization Act).

[16] Congress may have decided to use the term "serious difficulty" because this Court adopted the "serious difficulty" standard in its decision in *Crane*, 534 U.S. 407, leaving it for lower courts to interpret the standard in future cases. However, the Due Process Clause requires that when Congress uses a term in a statute, the term must be sufficiently precise to provide the public with sufficient notice of what actions are covered by the statute. The failure of a statute to meet that requirement renders it void for vagueness. *See Williams*, 128 S. Ct. at 1846. Court decisions, by contrast, often strategically rely on imprecision. *See Crane*, 534 U.S. at 413 ("[T]he Constitution's safeguards of human liberty in the area of mental

Coates v. *Cincinnati*, 402 U.S. 611, 614 (1971)); *Reno* v. *American Civil Liberties Union*, 521 U.S. 844, 870-71 & n.35 (1997). Vagueness is all the more problematic here because, judging the level of difficulty with which persons will be able to refrain from certain conduct is a perilous exercise in predicting human behavior—inaccurate fortune-telling that threatens to confine preventatively based on conjecture and prejudice. See *Heller*, 509 U.S. at 324 ("[P]sychiatric predictions of future violent behavior by the mentally ill are inaccurate."); *supra* Part I.

This Court has noted that "'[t]he line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk."' *Crane*, 534 U.S. at 412 (quoting American Psychiatric Association, Statement on the Insanity Defense 11 (1982), *reprinted in* G. Melton, J. Petrila, N. Poythress, & C. Slobogin, Psychological Evaluations for the Courts 200 (2d ed. 1997)). Without any statutory guidance as to what constitutes a "serious difficulty;" the public (and the BOP) is ill-equipped to "distinguish twilight from dusk." The Constitution prohibits a statute that invites such speculative and subjective judgments. See *Williams*, 128 S. Ct. at 1846.

Section 4248's linkage of the term "serious difficulty" with "serious mental illness, abnormality or disorder" further compounds the vagueness of the statute. The authors of the DSM-IV specifically caution that "a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be

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illness and the law are not always best enforced through precise bright-line rules.").

associated with the disorder." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders at xxiii (4th ed. 1994) ("DSM-IV").

Finally, the phrase, "serious mental illness, abnormality, or disorder" in itself is vague and, again, is not defined in the Adam Walsh Act. Because Congress failed to define these terms, a person of ordinary intelligence would be unable to determine what "illnesses," "disorders," and "abnormalities" they cover. For example, it is unclear whether "abnormality or disorder" includes an antisocial personality. This Court has specifically held that such a disorder is not the sort of "mental illness" that may constitutionally serve as the basis for a *parens patriae* civil commitment. *Foucha*, 504 U.S. at 75-84. Nonetheless, the terms "abnormality" and "disorder" seemingly encompass such a personality disorder—and numerous additional "abnormalities" and "disorders" that are common in many persons and that are insufficient as a basis for extending a person's criminal sentence by way of civil commitment.

The unconstitutionally vague nature of these statutory terms is confirmed by the fact that virtually all of the states with SVP statutes provided, in contrast to § 4248, statutory definitions of key terms.

The Kansas statute upheld by this Court defines, for example, the terms "sexually violent predator," "mental abnormality," "likely to engage in repeat acts of sexual violence," "sexually motivated," and "sexually violent offense." Kan. Stat. Ann. §§ 59-29a01 *et seq*. The fact that Kansas and numerous other states have attempted to define these terms reflects a recognition on their part that the terms, by themselves, are not sufficiently specific to withstand constitutional scrutiny.

B. Regulations.

In November 2008, the BOP issued final regulations relating to the certification of persons as sexually dangerous under § 4248. See 28 C.F.R. § 549.90 *et seq.*, issued in final form at 73 Fed. Reg. 70278 (Nov. 20, 2008)). Rather than ameliorate the vagueness problems with § 4248, however, the BOP regulations only make them worse—and heighten the potential for abuse of discretion and discriminatory enforcement by the authorities that administer the statute. At least three examples are apparent.

First, the BOP's regulations define "child molestation" as including "sexual exploitation" of minors. 28 C.F.R. § 549.93. Yet the regulations do not specify what types of conduct constitute "exploitation," thus introducing another vague and undefined term rather than clarifying the meaning of "molestation." Further, "exploitation," unlike "molestation," typically includes non-contact as well as contact offenses, meaning that the regulatory definition simultaneously enhances both the vagueness and the overbreadth of § 4248.

Second, although § 4247 uses the term "sexually violent conduct," the BOP regulations define that term to include actions that arguably are not "sexually violent," such as threats of force and threats "that the victim, or any other person, will be harmed," regardless of whether the "force" or "harm" constitutes sexually violent conduct. See *id.* § 549.92(a)-(b).

Third, the BOP regulations define "serious difficulty in refraining from sexually violent conduct or child molestation if released" to encompass factors that involve neither of these types of conduct. The regulations provide that, in considering whether an inmate has such "serious difficulty," the BOP may consider "indicators of inability to control conduct, such as . . . (1) Offending while under supervision; (2) Engaging in offense(s) when likely to get caught; (3) Statement(s) of intent to re-offend; or (4) Admissions of inability to control behavior." *Id.* § 549.95. In other words, the regulations allow the BOP to consider any indicators of inability to refrain from committing any offense, regardless of whether the offense is sex-related, in determining whether an inmate will have "serious difficulty" in refraining from sex-related conduct in the future. This is clearly the type of arbitrary enforcement that the void-for-vagueness doctrine is designed to prevent. The BOP regulations, in short, only provide further confirmation that § 4248 is unconstitutionally vague.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

The following States include, in their commitment statutes, definitions of terms identical or similar to terms used in 18 U.S.C. § 4248: Arizona (A.R.S. § 36-3701 *et seq.*, defining "sexually violent person"); California (Cal. Welf. & Inst. Code § 6600 *et seq.*, defining "sexually violent predator" and "diagnosed mental disorder"); Colorado (C.R.S.A. § 16-11.7-101 *et seq.*, defining "sex offender"); Florida (Fla. Stat. § 394-910 *et seq.*, defining "sexually violent predator," "likely to engage in acts of sexual violence," and "mental abnormality"); Illinois (725 ILCS 207/40, defining "mental disorder," "sexually violent offense," and "sexually violent person"); Iowa (Iowa Code § 226.1 *et seq.*, defining "likely to engage in predatory acts of sexual violence," "mental abnormality," "sexually motivated," "sexually violent offense," and "sexual predator"); Kansas (Kansas Stat. Ann. § 59-29a02, defining "sexually violent predator," "mental abnormality," and "sexually violent offense"); Massachusetts (ALM GL ch. 123A §§ 1, *et seq.* (defining "mental abnormality," "personality disorder," "sexual offense," and "sexually dangerous person"); Minnesota (Minn. Stat. §§ 253B.01 *et seq.*, defining "sexual psychopathic personality" and "sexually dangerous person"); Missouri (Mo. R.S. §§ 632.480 *et. seq.*, defining "mental abnormality," "predatory," "sexually violent offense," and "sexually violent predator"); Nebraska (Neb. R. Stat. Ann. §§ 71-1201 *et seq.*, defining "mentally ill" and "dangerous sex offender"); New Hampshire (N.H. R. Stat.. Ann. §§ 135-E:1 *et seq.*, defining "mental abnormality," "sexually violent offense," and "sexually violent predator"); New Jersey (N.J. Stat. Ann. § 30:4-27.1 *et seq.*, defining "mental abnormality," "sexually violent offense," and "sexually violent predator"); New York (NY CLS Men. Hyg. §§ 10.01 *et seq.*, defining "dangerous sex offender requiring confinement" and "mental abnormality"); North Dakota (N.D. Cent. Code § 25-03.3.01 *et seq.*, defining "sexually dangerous individual" and "sexually predatory conduct"); South Carolina (S.C. Code Ann. § 44-48-10 *et seq.*, defining "sexually violent predator," "sexually violent offense," "mental abnormality," and "sexually motivated"); Texas (Tex. Health & Safety Code § 841.001, defining "sexually violent predator," "repeat sexually violent offender," and "behavioral abnormality"); Virginia (Va. Code Ann. § 37.2.900 *et seq.*, defining "sexually violent predator," "mental abnormality" or "personality disorder," and "sexually violent offense"); Washington (Wash. Rev. Code § 71.09.060 *et seq.*, defining "sexually violent predator," "mental abnormality," "personality disorder," and "sexually violent offense"); Wisconsin (Wis. Stat. § 980.01 *et seq.*, defining "sexually violent person," "serious child sex offender," "sexually motivated," and "sexually violent offense").